Ontario Energy Board

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF an application by Hydro Ottawa Limited ("**Hydro Ottawa**") for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2016 and for each following year effective January 1 through to December 31, 2020;

AND IN THE MATTER OF Procedural Order No. 1 issued by the Ontario Energy Board on June 12, 2015 granting intervenor status to Rogers Communications Partnership, Quebecor Media and TELUS Communications Company (collectively, the "**Carriers**");

AND IN THE MATTER OF Procedural Order No. 2 issued by the Ontario Energy Board on June 29, 2015 setting dates for, *inter alia*, interrogatories of the parties and the intervenors.

ATTACHMENTS
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

Attachment 1
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

View Communications Inc.

Phone 905 823-9996
dmckeown@viewcom.ca

David McKeown CPA, CGA
View Communications Inc.

David McKeown is President of View Communications Inc., which provides telecommunications consulting services in areas dealing with business planning, competitive entry, inter-carrier negotiations, regulatory matters and business processes. Prior to the creation of View Communications Inc., in 1998, Mr. McKeown spent three years as Vice President, Regulatory at Rogers Telecom Inc. From 1984 to 2004 he held progressive positions at Unitel Communications (now Allstream).

He assists competitive telecommunications companies in regulatory proceedings including the costing of telecommunications services, costing methodologies, rate design and rate structure and telecommunications tariffs.

Mr. McKeown was active in the following projects and regulatory proceedings:

Price Caps: Assistance was provided to clients in the initial regulatory proceedings to develop the price cap regulation in Canada and assistance and support was provided during a subsequent follow-up price cap proceeding.

Support Structure: Mr. McKeown has represented clients for access to support structures.

Local Competition: In 1995, the CRTC initiated a proceeding to determine the underlying principles for local competition and the interconnection arrangements between CLECs and ILECs. Mr. McKeown worked with the Canadian Cable Television Association to develop recommendations regarding regulations, terms and conditions for local interconnection and competition.

Regulatory Safeguards: In the context of emerging competitive telecommunications markets, Mr. McKeown participated in regulatory proceedings to propose appropriate regulatory safeguards. The safeguards included an appropriate role for incumbent carriers' services groups, appropriate costing treatment for new services provided to competitors including mark-ups, imputation tests for bundled tariffed and non-tariffed services, unbundling of network elements for competitors, restrictions on the use of competitively sensitive information and the use of telephone company market trials and promotions by incumbents.

Contribution and Subsidies: Mr. McKeown has participated in regulatory proceedings to determine the level, nature and structure of subsidies paid by the industry in support of basic telephone service in high cost areas.

CLEC Entry: Competitive Local Exchange Carriers compete with incumbents in the provision of local telephone services. Regulatory and business advice is provided to companies developing business plans for entry into the local telephone services market. Advice includes regulatory obligations, costs of fulfilling the regulatory obligations, processes and costs for local number portability, acquisition of telephone numbers and remittance of contribution (subsidy) payments. CLEC entry also includes negotiations with

the telephone companies, on behalf of competitors, for the supply of local interconnection and related services, long distance interconnection and other services such as co-location.

Customer Transfer: Mr. McKeown chaired an industry group, created by the CRTC, to develop the processes for the transfer of local telephone service customers from ILECs to CLECs, with a minimum of disruption for customers. The CRTC subsequently ordered that the processes created by the Customer Transfer Group be used by all incumbent telephone companies and CLECs.

TELECOMMUNICATIONS STUDIES

Wireless Number Portability: In association with PricewaterhouseCoopers, a report was researched and written for the Canadian Wireless Telecommunications Association (CWTA) on the implementation of wireless number portability by wireless carriers. The report was subsequently submitted to the CRTC and used as the model for the introduction of wireless number portability in Canada.

807 Northwest Network Business Planning (Rural Community Network): Research support was provided on a project by Pacomm Consulting, which assessed the current telecommunications status and needs of Northwest Ontario. The assessment included everything from business plan to network design.

Antenna Mounting Terms and Conditions: A report was prepared for a municipality with recommendations on the prices, terms and conditions for mounting antennas on municipal property, with a focus on elevated water towers.

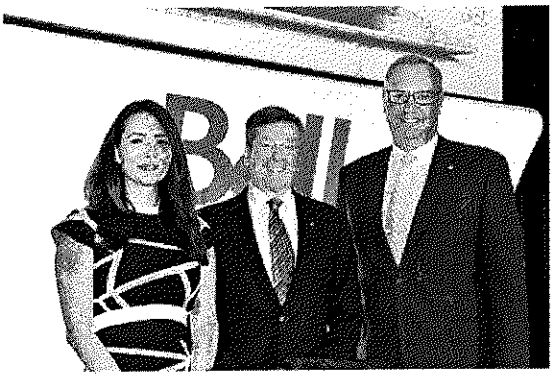
Attachment 2
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

BCE

News releases

Bell Gigabit Fibe bringing the fastest Internet to Toronto residents with a billion-dollar+ network investment, creation of 2,400 direct jobs



- The new Gigabit Fibe service from Bell will deliver the fastest Internet speeds available
- Gigabit Fibe to be rolled out to 1.1 million Toronto homes and businesses; 50,000 premises will have access this summer
- Bell investing $1.14 billion in Canada's biggest gigabit infrastructure project
- Close cooperation with Toronto Hydro increases project speed and efficiency
- Bell contributing Gigabit Fibe service to United Way Toronto's Community Hubs initiative
- Other cities getting Gigabit Fibe service as soon as this summer; fibre infrastructure expansion ongoing in Ontario, Québec and Atlantic Canada

TORONTO, June 25, 2015 /CNW Telbec/ - Bell Canada today announced it will deliver gigabit-per-second Internet speeds to homes and businesses across the City of Toronto with the new Gigabit Fibe service. Coupled with Bell's single largest infrastructure expansion project, creating approximately 2,400 direct jobs and significant economic and innovation benefits, Gigabit Fibe will bring North America's fastest Internet speeds to more than a million Toronto premises – starting with approximately 50,000 homes and businesses that will have first access this summer.

"Bell Canada has served Toronto since 1880, and we're proud to continue our legacy of communications leadership by bringing the fastest Internet speeds to consumers and businesses across Canada's largest city. Gigabit Fibe is a revolutionary broadband communications service that puts Toronto out front as a world-class Smart City," said George Cope, President and Chief Executive Officer of Bell Canada and BCE Inc. "Network leadership has been the bedrock of Bell's rapid transformation in recent years. Our existing high-speed fibre network is already driving fast Fibe TV and broadband Internet growth, and Canada's largest 4G LTE wireless network is supporting tremendous increases in smartphones and mobile data usage. Gigabit Fibe is key to accelerating Bell's leadership in home and business Internet services, and to supporting widespread access, innovation and economic benefits for Canadians into the future."

"As we plan for the future, we need to invest in our city and put in place the infrastructure required to keep Toronto competitive," said Mayor John Tory. "The rollout of Gigabit Fibe is a testament to Bell's commitment to investing in Toronto. This is Canada's largest gigabit Internet infrastructure project, creating 2,400 jobs for our

city. I'd like to thank Bell Canada for investing in Toronto and delivering services that meet the needs of today and the future."

Part of Bell's plan to invest $20 billion in its broadband fibre and wireless networks across Canada by the end of 2020, Gigabit Fibe will ultimately be available to 1.1 million homes and businesses across the city. Bell will launch Gigabit Fibe in other cities in Ontario, Québec and the Atlantic provinces as soon as this summer in some locations.

As with all other gigabit services, like the Google Fiber project in some US cities, service will initially be available at a maximum 940 Megabits per second and rise to a full 1000 Megabits per second or faster in 2016 as modem equipment suppliers catch up to gigabit speeds. To learn more about Gigabit Fibe, please visit Bell.ca/Fibe.

"Bell's existing fibre network already delivers both the best television experience anywhere with Fibe TV and fast broadband Internet. With Gigabit Fibe, we're boosting Internet speeds to blazing fast levels that open up incredible new online opportunities for consumers and business users alike," said Rizwan Jamal, President of Bell Residential Services. "Consumers can share and access the great content they want faster than ever before -- with Gigabit Fibe, you can download 100 photos or songs in 3 seconds, an entire HD movie in 7 seconds, or the whole 14 GB of Orphan Black in HD – shot right here in Toronto – in less than 2 minutes. Small businesses and major enterprises, technology innovators, manufacturers, resource companies, governments, healthcare providers, educators and utilities, all will have incredible new opportunities to share ideas and opportunities, and take full advantage of next-generation cloud data solutions such as Bell's national network of data hosting centres, including 3 state-of-the-art facilities in the City of Toronto."

A public partnership without public funding

Fully funded by Bell, Gigabit Fibe in Toronto is supported by the company's single largest infrastructure buildout. Bell's long-term agreements with Toronto Hydro to share utility poles across the city are accelerating the Gigabit Fibe project's efficiency and speeding up deployment. When the project is complete, Bell teams will have upgraded 27 Bell Central Office facilities across the city and installed over 9,000 kilometres of new fibre, both underground via more than 10,000 manholes and on approximately 80,000 Bell and Toronto Hydro poles around the city. Approximately 70% of the network will be aerial and 30% underground.

"Bell stays ahead of the game in communications by investing the capital and planning required, building the best technology teams and working with great partners, like the City of Toronto and Toronto Hydro in the Gigabit Fibe project," said Stephen Howe, Bell's Chief Technology Officer. "Our engineers, technicians and field crews are energized about this incredible undertaking and we're working cooperatively with our partners, suppliers and contractors, residents and businesses to make Toronto North America's Gigabit leader as quickly and efficiently as possible."

Bell is building Gigabit Fibe on a neighbourhood-by-neighbourhood basis and will advise residents in advance if Bell crews may need to access their property. Torontonians can visit Bell.ca/Toronto for updates and Gigabit Fibe availability. Bell will have a dedicated customer service process for Gigabit Fibe and work with Toronto's 3-1-1 information service to answer any questions about the infrastructure project.

Bell suppliers and contractors working on the Gigabit Fibe buildout in Toronto include Aecon, AGIR, Alcatel-Lucent, Asplundh, Corning, Davey Tree, Distinct Tech, Effigis, Expertech, Huawei, Infrastructel, MMM, Somerville, Sentrex, Telecon Group, Teranet and TRJ Telecom.

Bell's industry-leading capital investments in Canada's newest broadband networks have a significant positive economic effect, enabling businesses to better innovate, compete and create high value jobs with the fastest Internet access. Including 2,400 direct jobs created in Toronto, Bell estimates Gigabit Fibe Toronto will create more than 8,000 direct and indirect jobs in Ontario and $2.5 billion in economic activity over the next 2 years.

Gigabit support for the United Way

As part of its ongoing support for the United Way Toronto Community Hub initiative, Bell will contribute Gigabit Fibe service to each the charity's city-wide Community Hubs initiative, including Access Point on the Danforth,

Bathurst-Finch, Dorset Park, Jane Street, Mid-Scarborough, Rexdale Community Hub, Victoria Park Hub, and the planned Bridletowne Neighbourhood Centre serving the Steeles L'Amoreaux community.

United Way Community Hubs are focused on building healthy neighbourhoods, and currently host more than 50 community organizations. The Hubs bring together targeted health and social services with essential mixed-use community space under one roof.

"There's no question that in 2015, the most powerful access to online resources and services is a major factor in supporting opportunity and healthier, more vibrant communities," said Susan McIsaac, President and CEO of United Way Toronto. "Bell and United Way Centraide are close partners here in Toronto and across Canada. Welcoming our Community Hubs into the infrastructure that will make Toronto one of the world's smartest cities again demonstrates Bell's genuine community spirit and desire to make a positive difference in the lives of Canadians."

Bell matches employee donations to United Way Centraide across Canada. In 2014, the Bell team and Bell Let's Talk gave more than $1.1 million to United Way Toronto alone, supporting projects such as the United Way mental health crisis response agencies that answer almost 360,000 calls each year. In 2012, George Cope served as Chair of the United Way Toronto Campaign Cabinet, which led that year's charity campaign to record donations of $117 million.

Bell remains Canada's broadband leader

Canada's largest Internet service provider, Bell serves approximately 3.3 million total high-speed Internet customers. Bell will make Gigabit Fibe available in other cities across Ontario, Québec and the Atlantic provinces over the next year, some also as early as this summer. Cities primed for Gigabit Fibe include Québec City, locations in Montréal, Laval, Blainville, Gatineau, Joliette, Saint-Jérôme, Chicoutimi, Sherbrooke, Vaudreuil/Valleyfield, St. John's, Charlottetown, Halifax, Saint John, Fredericton, Moncton, Sudbury, North Bay, Peterborough and Kingston. Gigabit Fibe infrastructure rollouts are under way in even more cities and service availability will be announced over the next year.

In April, Bell unveiled plans to invest $20 billion across the country from 2015 to the end of 2020 to continue expanding its broadband fibre and 4G LTE mobile networks, one of the largest capital projects in any industry in Canada.

Investing more than anyone in Canada's modern communications infrastructure and R&D, in urban, rural and remote locations including the North, Bell is dedicated to ensuring Canada remains competitive at the global level in next-generation broadband communications.

About Bell

Bell is Canada's largest communications company, providing consumers and business customers with wireless, TV, Internet, home phone and business communications services. Bell Media is Canada's premier multimedia company with leading assets in television, radio, out of home, and digital media. Bell is wholly owned by Montréal's BCE Inc. (TSX, NYSE: BCE). For more information, please visit Bell.ca.

The Bell Let's Talk initiative promotes Canadian mental health with national awareness and anti-stigma campaigns, like Clara's Big Ride for Bell Let's Talk and Bell Let's Talk Day, and significant Bell funding of community care and access, research, and workplace initiatives. To learn more, please visit Bell.ca/LetsTalk.

CAUTION CONCERNING FORWARD-LOOKING STATEMENTS

Certain statements made in this news release are forward-looking statements. These statements include, without limitation, statements relating to the proposed deployment in the City of Toronto and other cities of the Bell Gigabit Fibe service, the value of the planned investment, the expected timeframe of the network deployment, the number of jobs and economic benefits expected to result from the network deployment, the value of capital investments expected to be made by Bell Canada from 2015 to the end of 2020, and other statements that are not historical facts. Forward-looking statements are typically identified by the words *assumption, goal, guidance, objective, outlook, project, strategy, target* and other similar expressions or future or conditional verbs such as *aim, anticipate, believe, could, expect, intend, may, plan, seek, should, strive* and

will. All such forward-looking statements are made pursuant to the 'safe harbour' provisions of applicable Canadian securities laws and of the United States *Private Securities Litigation Reform Act of 1995.*

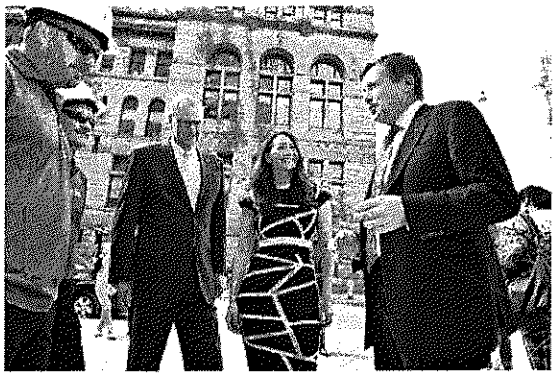
Forward-looking statements, by their very nature, are subject to inherent risks and uncertainties and are based on several assumptions, both general and specific, which give rise to the possibility that actual results or events could differ materially from our expectations expressed in or implied by such forward-looking statements. As a result, we cannot guarantee that any forward-looking statement will materialize and we caution you against relying on any of these forward-looking statements. The forward-looking statements contained in this news release describe our expectations as of June 25, 2015 and, accordingly, are subject to change after such date. Except as may be required by Canadian securities laws, we do not undertake any obligation to update or revise any forward-looking statements contained in this news release, whether as a result of new information, future events or otherwise. The proposed Bell Gigabit Fibe network deployment, and the expected timeframe, are subject to risks including, without limitation, the timely supply of parts and equipment, and the costs thereof, by suppliers and contractors. Accordingly, there can be no assurance that the proposed network deployment will be completed or that it will be completed within the expected timeframe. There can also be no assurance that the employment and economic benefits expected to result from the proposed network deployment will be realized. The value of capital investments expected to be made by Bell Canada from 2015 to the end of 2020 assumes that capital investments will continue at current levels. However, there can be no assurance that such investment levels will be maintained with the result that the value of actual capital investments made by Bell Canada during such period could materially differ from current expectations.

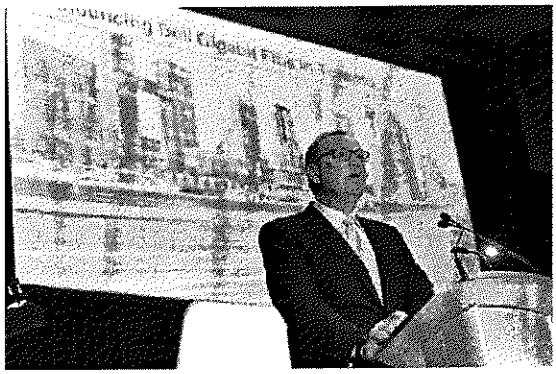
The proposed Bell Gigabit Fibe deployment could also be impacted by our operational risks. Please refer to BCE's 2014 Annual MD&A dated March 5, 2015 (included in the BCE 2014 Annual Report) and BCE's 2015 First Quarter MD&A dated April 29, 2015, for a detailed description of such risks, filed by BCE with the Canadian provincial securities regulatory authorities (available at Sedar.com) and with the U.S. Securities and Exchange Commission (available at SEC.gov). These documents are also available at BCE.ca.

Media inquiries:
Jason Laszlo
1-855-614-6602
jason.laszlo@bell.ca
@Bell_News

Investor inquiries:
Thane Fotopoulos
514-870-4619
thane.fotopoulos@bell.ca

SOURCE Bell Canada





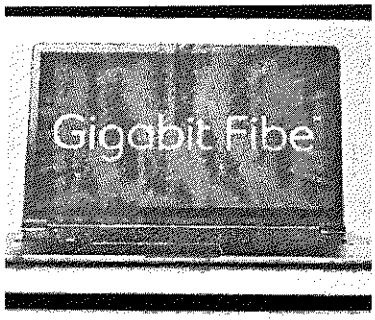


Image with caption: "Bell CEO, George Cope, and Mayor John Tory today announced Bell Gigabit Fibe - the fastest Internet service available - is coming to Toronto consumers. From left, Ziya Tong, Co-Host of Daily Planet, Toronto Mayor John Tory and George Cope, CEO of Bell. (CNW Group/Bell Canada)". Image available at: http://photos.newswire.ca/images/download/20150625_C5819_PHOTO_EN_18314.jpg

Image with caption: "Bell CEO, George Cope, and Mayor John Tory today announced Bell Gigabit Fibe - the fastest Internet service available - is coming to Toronto consumers. From left, George Cope, CEO of Bell, Ziya Tong, Co-Host of Daily Planet and Toronto Mayor John Tory. (CNW Group/Bell Canada)". Image available at: http://photos.newswire.ca/images/download/20150625_C5819_PHOTO_EN_18315.jpg

Image with caption: "Bell CEO, George Cope, and Mayor John Tory today announced Bell Gigabit Fibe - the fastest Internet service available - is coming to Toronto consumers. George Cope, President and CEO of Bell Canada and BCE Inc. (CNW Group/Bell Canada)". Image available at: http://photos.newswire.ca/images/download/20150625_C5819_PHOTO_EN_18316.jpg

Image with caption: "Bell CEO, George Cope, and Mayor John Tory today announced Bell Gigabit Fibe - the fastest Internet service available - is coming to Toronto consumers. From left, George Cope, CEO of Bell and Toronto Mayor John Tory. (CNW Group/Bell Canada)". Image available at: http://photos.newswire.ca/images/download/20150625_C5819_PHOTO_EN_18317.jpg

Attachment 3
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 99-13

Ottawa, 28 September 1999

PART VII APPLICATION – ACCESS TO SUPPORTING STRUCTURES OF MUNICIPAL POWER UTILITIES — *CCTA vs MEA et al* – Final Decision

File No.: 8690-C13-01/97

Table of Contents

	Paragraph
Summary	
Introduction	1
The Application	3
Issues	26
A. The Commission's Constitutional and Statutory Jurisdiction Under Subsection 43(5) of the *Telecommunications Act*	28
1. *Jurisdictional Issues Raised by the Parties*	28
2. *Position of the CCTA and the MEA: Constitutional Jurisdiction*	34
3. *Position of the CCTA and the MEA: Statutory Jurisdiction*	45
4. *Position of Other Parties: Constitutional and Statutory Jurisdiction*	77
5. *Analysis and Conclusion on Jurisdiction*	88
5.1 Constitutional Jurisdiction	89
5.2 Statutory Jurisdiction	107
a. Approach to Statutory Interpretation	107
b. Legislative History	111
c. Canadian Telecommunications Policy and Other Public Interest Concerns	125
d. Interpretation of "person who provides services to the public"	133
e. Need for Prior Negotiation	135
f. Interpretation of "any conditions that the Commission determines"	137
g. Interpretation of "transmission line"	140
h. Interpretation of "highway or other public place"	149

Canada

B. Procedural Fairness 165
C. The Need for Regulatory Intervention 174
D. Pole Costs and Rental Rate 181
1. *Introduction* 181
2. *Incremental Costs* 187
3. *Capital Costs* 196
4. *Space Allocation Factor* 213
E. Non-Monetary Terms of the Support Structure Agreement 227
F. Other Causal Costs Due to Cable Company Attachments on Power Utility Poles 232
G. Pole Rental Rate of the Municipal Power Utilities not Represented by the MEA 236

Conclusion 241

Attachment A – List of Respondents

Summary

Cable companies and competitive telecommunications carriers often rent space on poles and underground conduit owned by telephone companies and power utilities to carry the transmission lines that they use to provide service to their customers. This allows them to provide service without installing their own poles and conduit, often called support structures.

In Telecom Decision CRTC 95-13 Access to Telephone Company Support Structures, *the Commission established a pole rental rate of $9.60 per year payable by cable companies and telecommunications carriers wishing to rent space on such poles. This rate applies to poles owned by several larger telephone companies, including most of those that were then part of the Stentor group.*

In the application addressed in this decision, the Canadian Cable Television Association (CCTA) requested that the Commission grant access to the poles owned by certain power utilities in Ontario at the same rate of $9.60 per year.

The Municipal Electric Association (MEA), an organization representing most Municipal Public Utility Commissions and the Hydro Electric Commission of Ontario, opposed the CCTA's application. It considered, among other things, that the Commission did not have jurisdiction to deal with the application.

The Commission, however, has concluded that, in the circumstances of this case, it has the constitutional and statutory jurisdiction to deal with this matter under the Telecommunications Act.

The Commission considers that cable companies should pay incremental costs and make a reasonable contribution to capital costs associated with attaching their cables to poles owned by power utilities. Based on this principle, the Commission is establishing an annual pole rental rate of $15.89 per pole for cable company access to hydro poles owned by the power utilities named in this decision, until and unless the parties agree otherwise.

Introduction

1. In 1996, the Municipal Electric Association (the MEA), a voluntary organization whose members comprise the municipal Public Utilities Commissions and Hydro Electric Commissions of Ontario (the municipal power utilities or PUCs), decided to overhaul the support structure arrangements between municipal power utilities and certain cable television companies in Ontario. On behalf of its members, the MEA proposed a revised support structure agreement to include an annual pole rental rate to cable companies of over $40 per pole. The cable companies considered the MEA's proposals unacceptable. Despite extended negotiations, the cable companies were unable to agree with the MEA on the terms of a revised support structure agreement, including the applicable pole rental rate.

2. The support structure agreements between the cable companies and the municipal power utilities expired on or before 31 December 1996 and provided for an annual pole rental rate of $10.42. Beginning in January of 1997, the municipal power utilities refused to grant the cable companies new permits for access to their support structures.

The Application

3. On 13 February 1997, the Canadian Cable Television Association (the CCTA) filed an application pursuant to Part VII of the CRTC *Telecommunications Rules of Procedures* (the Rules), on behalf of Cablenet (a division of Cogeco Cable Inc.); Mr. Pierre Juneau (as trustee for 3305911 Canada Inc. in respect of certain cable distribution undertakings that were then to be transferred by Rogers Cablesystems Ltd.)[1]; Rogers Cablesystems Limited and its subsidiaries; and Shaw Cablesystems Ltd. and its subsidiaries (the cable companies or the Applicants). That application was brought against a number of municipal power utilities in Ontario. The CCTA's application was brought under subsections 43(5) and 61(2) of the *Telecommunications Act* (the Act). It sought both final and interim relief in order to gain access to the support structures of those municipal power utilities.

4. Subsection 43(5) of the Act provides as follows:

> *43. (5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.*

5. The municipal power utilities that are party to this proceeding are identified in Attachment A and are hereinafter collectively referred to as the Respondents. The MEA acted on behalf of most (but not all) the utilities named as Respondents. Prior to 1 January 1998, the MEA represented 28 of the Respondent utilities. In its final submission, the MEA indicated that it represented 25 of the Respondents[2]. The remaining Respondents not represented by the MEA are: Canadian Niagara Power (CNP); Chatham Hydro; the Hydro Electric Commission of the Town of Deep River (Deep River); L'Orignal Hydro Electric Commission (L'Orignal HEC); Pelham Hydro-Electric Commission (Pelham HEC); Plantagenet Hydro Electric Commission (Plantagenet HEC); Webbwood Hydro Electric Commission (Webbwood HEC); Toronto Hydro-Electric Commission; and the West Elgin Hydro-Electric Commission. Deep River and CNP each filed an answer on its own behalf.

6. The cable companies have obtained support structure services from the municipal power utilities for many years pursuant to successive support structure agreements. As noted above, the support structure agreements between the cable companies and the PUCs expired on or before 31 December 1996. In anticipation of the expiry of the agreements, negotiations were commenced in the spring of 1996 to conclude new agreements. While the cable companies had serious concerns about many aspects of the MEA's proposed new model agreement, the key point of disagreement between the parties was the support structure rate. The MEA took the position that the support structure rate should increase from $10.42 per pole per year to $40.92 per pole per year.

7. The cable companies objected to the MEA's proposed rate increase on the basis that this represented an increase of approximately 300% over the existing rate and contrasted sharply with the $9.60 rate established by the CRTC in *Access to Telephone Company Support Structures*, Telecom Decision CRTC 95-13, dated 22 June 1995 (Decision 95-13) for access to telephone company poles. The cable companies were unable to reach an

agreement with the municipal power utilities regarding terms of access on either an interim or final basis. In addition, the cable companies found themselves in the position of being unable to obtain support structure permits from any of the municipal power utilities.

8. In its application for interim relief, the CCTA requested that the Commission grant the Applicants access to the support structures of the Respondents on an interim basis according to the terms that applied in 1996, subject to two exceptions. First, the pole rental rate of $10.42 per pole per year would apply on an interim basis. The CCTA submitted that the interim rates that it proposed would be subject to adjustment retrospectively when the Commission would set final rates. Second, the CCTA requested that the Respondents be required to process permit applications within 30 days of receipt, failing which a permit application would be deemed to be approved. The CCTA indicated that an application could be denied solely on the basis of safety or technical concerns. It was submitted that this second adjustment was required in order to ensure that the Applicants were able to proceed with their plans in a timely manner.

9. In its Answer, the MEA objected to the CCTA's application, for both interim and final relief, on the basis that the Commission is without statutory and constitutional jurisdiction to grant the relief sought, as well as on the merits of the application. The MEA reserved the right to make additional submissions on the jurisdictional issues at a later date and expressly did not attorn or concede to the Commission's jurisdiction in this matter.

10. By letter dated 27 March 1997, the Commission indicated that it was not prepared to rule on the application for interim relief at that time and stated that it would be in the public interest if the parties attempted to resolve their dispute with the assistance of Commission staff. Consequently, the Commission suspended consideration of the CCTA's application, while the parties took part in an informal and non-binding dispute resolution process designed to facilitate and encourage the parties to arrive at their own mutually acceptable settlement with the assistance of Commission staff. Commission staff would issue a non-binding opinion on matters that were unresolved after the meeting with the parties. This non-binding opinion would provide the parties the opportunity to review the relative merits of their case and encourage more realistic settlement negotiations before resorting to a formal determination by the Commission. If a party considered that any matter still remained unresolved two weeks after the staff opinion had been provided to the parties, any party could file a request that the Commission re-initiate the process to determine, on an interim and final basis, any of the issues that were not satisfactorily resolved. The Commission also noted that the parties would be provided with an opportunity to comment on staff's opinion and make further submissions, including submissions regarding the issues of constitutional and statutory authority. It was also stated that the staff opinion, all material filed by the parties prior to the release of the opinion and any subsequent submissions filed would form part of the record of the proceeding upon which the Commission's decision would be based.

11. The parties met with Commission staff on 23 April 1997. At that meeting, it was apparent that the principal issue in dispute between the parties related to the appropriate costing methodology and associated pole rental rate. The methodology proposed by the Respondents resulted in a proposed pole rental rate of $40.92 per pole per annum. As noted above, the most recent agreements that expired on or before 31 December 1996, had provided for a pole rental rate of $10.42 per pole per annum. At the conclusion of the meeting, the parties acknowledged that there was little likelihood of resolving at the meeting, the principal dispute relating to the appropriate costing methodology and

associated pole rental rate. As a result, the meeting was adjourned and discussion of the other issues raised by the parties was reserved pending release of a non-binding opinion by Commission staff solely on the issue of the appropriate methodology and pole rental rate.

12. On 13 May 1997, Commission staff issued a non-binding opinion suggesting that the parties adopt an annual support structure rate of $13.40 per pole. In an attempt to build on the discussion which took place during the Commission's dispute resolution process, the parties met throughout June and July, but were unable to resolve their disagreements. On 8 August 1997, the CCTA wrote to the Commission requesting that its application for interim and final relief be re-initiated.

13. By letter dated 8 September 1997, the Commission resumed the process. With respect to the interim relief, the Applicants and Respondents were given the opportunity to file evidence and any additional submissions, including submissions regarding the non-binding staff opinion and the issues of constitutional and statutory authority. Other interested parties were also given the opportunity to file comments.

14. On 1 October 1997, the MEA served on the Attorneys-General of Canada and the provinces a Notice of Constitutional Question pursuant to the *Federal Court Act*. However, none of the Attorneys-General filed submissions.

15. In the course of this proceeding, the Commission received comments relating to the jurisdictional issues from the CCTA, the MEA and CNP as well as from Saskatchewan Power Corporation, TransAlta, UMG Cable Telecommunications Inc. (UMG), Ontario Hydro, Telus Corporation (Telus) and Stentor Resource Centre Inc. (Stentor) on behalf of BC TEL, Bell Canada and MTS NetCom Inc., as interested parties.

16. On 7 November 1997, following two rounds of submissions by the parties, the Commission denied the request for interim relief on the basis that the Applicants had not met one of the criteria for granting interim relief.[3] Having come to the conclusion that interim relief should be denied, the Commission did not need to address, at that time, the other arguments raised by the parties, including the issue of its constitutional and statutory jurisdiction.

17. In accordance with the Commission's Revised Directions on Procedure issued 23 September 1997, the Commission received responses to interrogatories and final and reply comments on behalf of the parties in respect of the application for final relief. The record closed 17 February 1998.

18. It is to be noted that the Commission has had before it a second and similar application filed by UMG on 25 February 1997 pursuant to Part VII of the Rules. In its application, UMG sought interim relief pursuant to subsections 42(1), 43(5), 55 and 61 of the Act and named Ontario Hydro as Respondent. In a decision dated 27 March 1997, the Commission granted UMG interim relief and made preliminary findings on jurisdictional issues.

19. On 24 April 1997, Ontario Hydro filed with the Federal Court of Appeal a Motion for Leave to Appeal as well as an Originating Notice of Motion for judicial review of the Commission's decision. In both of these applications, Ontario Hydro submitted, amongst other issues, that the Commission had erred in finding that it had the statutory and

constitutional jurisdiction to grant UMG interim relief. On 29 May 1998, the Federal Court of Appeal issued its decisions denying Ontario Hydro's application for leave to appeal and quashing the application for judicial review.

20. The Federal Court of Appeal's decisions denying leave to appeal and quashing the motion for judicial review of the Commission's decision in the UMG v. Ontario Hydro matter were issued after the close of the proceeding for final relief in the instant case.

21. In a letter dated 3 June 1998, the CCTA requested that the Commission render a decision in respect of its application for final relief given that it had become obvious that the parties were not able to settle this matter on their own and "given that any doubt regarding the CRTC's jurisdiction over access disputes has been dispelled by the Federal Court of Appeal's recent decision". In particular, the CCTA maintained that the Federal Court of Appeal had "upheld the CRTC's jurisdiction under the *Telecommunications Act* to resolve disputes between cable companies and power utilities over access to power utility poles".

22. In a letter dated 4 June 1998, the MEA took exception to the CCTA's position on several grounds. In particular, the MEA noted that the Court dismissed Ontario Hydro's application for leave to appeal without providing any reasons for its decision. In addition, the MEA argued that the Court's decision does not form a binding precedent and is not a ruling on the validity of the constitutional and statutory arguments made to the Commission. The MEA noted that some of the submissions made by the MEA in the instant case differ significantly from those advanced to the Court by Ontario Hydro and the leave sought there was to appeal an interim order, not a final order.

23. The MEA also submitted that the CCTA's letter of 3 June 1998 presents further legal submissions after the close of the proceedings, is consequently a breach of procedural fairness, and should not be considered.

24. The Commission has determined that the aforementioned letters should be considered part of the record of the proceeding. The Court's decisions represent a change in circumstances which occurred after the close of the record of this proceeding and which the parties could not have addressed previously. The Commission considers that the allegation of procedural unfairness raised by the MEA is without merit since the MEA has had the opportunity to, and did, fully respond to the CCTA's position.

25. The Commission acknowledges that the Federal Court's decisions relating to the UMG v. Ontario Hydro interim decision do not represent a binding precedent on the jurisdictional issues raised in the present application. Accordingly, the Commission has made its final determination in the present case based on its own merits, giving due consideration to all arguments raised by the parties to this proceeding, including the jurisdictional arguments similar to those raised in the UMG v. Ontario Hydro matter.

Issues

26. In its application, the CCTA asked the Commission to grant the cable companies access, on a final basis, to the municipal power utilities' support structures on the same terms and conditions as applied in 1996, with the exception that the annual pole rental rate be set at $9.60 per pole per year.

27. The main issues raised in the submissions relating to the application for final relief are as follows:

(a) the Commission's constitutional and statutory jurisdiction under subsection 43(5) of the Act;

(b) an alleged breach of procedural fairness;

(c) the need for regulatory intervention;

(d) the appropriate pole costs and pole rental rate;

(e) the non-monetary terms of the support structure agreement;

(f) other causal costs due to cable company attachments on utility poles; and

(g) the pole rental rate for the PUCs not represented by the MEA.

A. The Commission's Constitutional and Statutory Jurisdiction under Subsection 43(5) of the *Telecommunications Act*

1. Jurisdictional Issues Raised by the Parties

28. The Commission notes that the MEA has, throughout this process, consistently maintained that the Commission is without statutory and constitutional jurisdiction to grant the relief requested. The CCTA has also maintained its position that the Commission has jurisdiction to grant the relief requested.

29. In its final submissions, the MEA reiterated its position, and repeated and relied on its submissions at the interim stage. In its reply submissions on final relief, the MEA raised further jurisdictional arguments including submissions with respect to the interpretation of the expression "other public place", in subsection 43(5) of the Act, and the related issue of support structures located on private land.

30. The MEA's submissions focused upon the following two jurisdictional issues:

(i) The Commission's statutory jurisdiction pursuant to subsection 43(5) of the Act to make the Orders requested by the CCTA; and

(ii) Parliament's constitutional jurisdiction to adopt and the Commission's constitutional jurisdiction to apply subsection 43(5) in the manner requested by the CCTA.

31. In addition, the MEA submitted that the Commission's decision in the UMG v. Ontario Hydro matter dated 27 March 1997, which involved similar questions as arise in the MEA's case, although the factual foundation is different, was incorrect. The MEA further noted that the Commission's decision in the UMG v. Ontario Hydro case was a "preliminary" decision and that the Commission made clear that it was making that decision on the basis that it could, after a full argument by the parties, arrive at a different

conclusion concerning jurisdiction. In the MEA's view, this was an appropriate qualification as extensive submissions and constitutional facts were not available to the Commission at that time.

32. In its final submissions, the CCTA relied on its interim submissions and on the reasons given in the Commission's decision in the UMG v. Ontario Hydro matter, and made additional arguments including submissions relating to the interpretation of "other public place".

33. Both CNP and Deep River objected to the Commission intervening in this matter. CNP argued that subsection 43(5) did not apply because the poles are not public assets, many of the poles are located on property owned by CNP and the allegation that the cable companies cannot obtain access to support structures on terms acceptable to them was wholly subjective and one-sided. Deep River submitted that the Commission should ensure that further negotiations continue, resorting to mediation if necessary.

2. Position of the CCTA and the MEA: Constitutional Jurisdiction

34. The MEA submitted that subsection 43(5) is outside the constitutional jurisdiction of the federal Parliament and is properly a matter for the provincial legislatures.

35. In this regard, the MEA raised the following arguments:

(a) municipal power utilities are creatures of provincial statute and are responsible to their local municipalities;

(b) the MEA's members are intensely and exhaustively regulated by Ontario Hydro;

(c) a complex legislative scheme applies to the activities of Ontario's municipal power utilities;

(d) many Canadian provinces have established regulatory schemes for the regulation of power utility pole attachments;

(e) numerous factors contribute to the decisions and standards applicable to power utility pole attachments;

(f) Electricity is dangerous and pole attachment activities must remain within the power of the MEA's members in order to ensure the safety of the workers and the public, and the technical reliability of the power distribution system; and

(g) The municipal power utilities and the cable television industry have a long-standing relationship and a history of negotiated agreements.

36. In addition, the MEA argued that circumstances have changed since the Supreme Court decided in the late 1970s that because cable companies were single indivisible undertakings, all of the functions of the cable companies, including the system for the distribution of signals, fell under federal jurisdiction. The MEA submitted that the Supreme Court's original decision requires review.

37. The MEA noted that cable companies have been found by the Commission to have a dual nature, to be both broadcasting and telecommunications undertakings. Furthermore, the MEA noted that, while there was some sense in finding that the entire undertaking was connected and indivisible in the past, cable companies now no longer have to own their distribution facilities. In other words, while the reception of signals may still be essential to the cable company, a cable company may lease the entire distribution network such that the network may be entirely within a single province's boundaries. In this regard, the MEA noted that a similar division occurred in the case of Ontario Hydro where the Supreme Court of Canada found that Ontario Hydro's nuclear facilities fell within federal jurisdiction but the system for the distribution of power and conventional power generating facilities were provincial in nature.

38. The MEA further argued that subsection 43(5) does not have any connection to federal jurisdiction. There is no mention of any federal undertaking or any work or object of a federal nature, unlike the rest of sections 42 and 43 which mention "Canadian carriers" and "distribution undertakings". While the MEA submitted that a provision may be subsumed within federal jurisdiction when it is closely connected to a federal statutory scheme, it argued that this close connection is subject to attack.

39. The MEA submitted that the Supreme Court of Canada's test in *General Motors v. City National Leasing*[4], stands for the principle that a very close connection must exist between the provision and the Act as a whole where provincial powers are heavily affected by federal legislation as in the case of subsection 43(5). In this regard, the MEA submitted that subsection 43(5) is easily severable from the rest of the scheme. There is no evidence that cable companies would not be able to operate without subsection 43(5). Moreover, subsection 43(5) can be read down so that it does not apply to provincial power utilities.

40. The MEA noted that an elaborate and complex series of provincial statutes and regulations govern all of the activities of the PUCs in Ontario and ties them to municipalities. While the PUCs are responsible for control and management of the utilities, the municipalities, pursuant to the *Municipal Act*, and Ontario Hydro play a role in the control of the property and finances of the PUCs. In the MEA's view, anything that affects PUCs affects this provincial legislative scheme. The access and conditions requested by the CCTA to the power utility poles would affect their core activities.

41. The MEA submitted that the distribution of power, due to the danger involved, does not leave a wide margin for error. The Commission's involvement in the power industry is not only about price but also about conditions of access. In the MEA's view, there is an elaborate provincial scheme to ensure that electricity flows to consumers safely, effectively and efficiently and this system must be preserved even if as a result some inconvenience is incurred by cable companies.

42. In response, the CCTA noted that while the Commission has found that cable companies may have a dual nature, as they may act as both broadcasting undertakings and telecommunications common carriers, cable companies are subject to federal jurisdiction under both aspects of their dual nature.

43. The CCTA argued that there is no doubt that Parliament has the constitutional authority to affect property rights in connection with the regulation of Canadian carriers and distribution undertakings. In this regard, the CCTA noted that section 43 establishes a complete legislative regime to enable Canadian carriers and distribution undertakings to

construct, operate and maintain their transmission lines. Subsections 43(2) to 43(4) deal with situations where it is necessary to construct support structures for transmission lines while subsection 43(5) deals with support structures that already exist. All of these provisions are within the legislative competence of Parliament.

44. The CCTA argued that the analytical approach set out in the test advanced by the MEA as applied in *General Motors v. City National Leasing* has no application to telecommunications. The CCTA submitted that even if the test is relevant, subsection 43(5) is an integral element in the general legislative scheme under section 43 for the construction of transmission lines by Canadian carriers and distribution undertakings and ensures that support structures are shared whenever possible, thereby avoiding needless expense and public inconvenience. In the CCTA's view, it is not only reasonable for the Commission to have jurisdiction in the present situation, it is necessary.

3. Position of the CCTA and the MEA: Statutory Jurisdiction

45. The MEA submitted that subsection 43(5) displays multiple ambiguities and its ordinary meaning is unclear. In particular, the MEA submitted that words and phrases such as "person", "supporting structure of a transmission line", "other public place" and "conditions" are ambiguous. In the MEA's view, these ambiguities require going beyond their ordinary meaning.

46. The MEA submitted that, because subsection 43(5) is unclear, it is important to examine Parliament's intention when it drafted the provision. The MEA argued that, while the Commission chose the dictionary approach in the UMG v. Ontario Hydro decision, it should have examined the statutory context of the provision. In this regard, the MEA submitted that the two elements of statutory context are the immediate context of the word or phrase as well as the use elsewhere in the statute of the particular terms considered ambiguous.

47. The CCTA argued that the Commission did not err in relying on the ordinary meaning of subsection 43(5) in the UMG v. Ontario Hydro decision. The CCTA noted that the Commission also considered and adopted the statutory context, which supports the interpretation advocated by the CCTA in the present proceeding. In the CCTA's view, the purposive interpretation of subsection 43(5) would support an expansive interpretation in view of the obvious purpose of this section which is to promote the sharing and efficient use of support structures. The CCTA noted that in the UMG v. Ontario Hydro decision, the Commission describes the legislative history of subsection 43(5) and from this description, it is clear that subsection 43(5) represents an integral element in a coherent legislative scheme to address support structure issues and an attempt to accommodate provincial concerns regarding the possible proliferation of support structures.

48. The MEA argued that, based on section 4 of the Act, the "person" who provides a public service cannot be a distribution undertaking because subsection 43(5) does not explicitly include distribution undertakings. The MEA noted that Parliament referred to "Canadian carriers" and "distribution undertakings" in other related provisions of sections 42 and 43 but switched to dealing with "person" in subsection 43(5). Furthermore, the MEA submitted that the word "person" was ambiguous in view of the use of the word "fournisseur" in the French version, rather than a term equivalent to "person". The MEA argued that if one applies the purposive approach in interpreting the Act, subsection 43(5) should properly be interpreted to allow non-broadcasting entities to gain access to the

poles that Canadian carriers and distribution undertakings were given the power to construct under sections 42 and 43. Subsection 43(5) was not meant to allow the Commission to make orders against organizations outside the federal sphere of influence.

49. The CCTA submitted that the MEA's interpretation of the word "person" lacks both merit and relevance. In the CCTA's view, there is no dissonance or incongruity between the French and English phrases. Both refer in general terms to a supplier of services to the public. It is clear that a cable company qualifies as a "person who provides services to the public" or as "le fournisseur de services au public".

50. The MEA argued that the UMG v. Ontario Hydro decision was incorrect in finding that the absence of qualification of the term "transmission line" in subsection 43(5) indicated Parliament's intent to include a more general type of transmission line. The MEA submitted that the terms "transmission line" and "supporting structures", when examined in the context of the statute itself, should be interpreted as telecommunications transmission lines and supporting structures. In the MEA's view, power utility poles themselves are outside the Commission's statutory jurisdiction.

51. The MEA submitted that because other subsections of the Act specifically refer to "transmission line" as being qualified in the context of telecommunications carriers or distribution undertakings, the use of the phrase "transmission line" in subsection 43(5) similarly must refer to a telephone line or a cable distribution wire rather than a power line. In the MEA's view, such an interpretation retains the consistent meaning of the phrase "transmission line" throughout the statute. Furthermore, the MEA submitted that the similarity between the terms "transmission facility" and "transmission line" would indicate that the transmissions with which the Act is concerned involve intelligence or data and not electrical power. In addition, the MEA submitted that the Commission's reliance, in the UMG v. Ontario Hydro decision, on Parliament's use of the term "telecommunications line" in the definition of "international submarine cable" as an indication of the scope of "transmission line" in subsection 43(5), was flawed. In the MEA's view, the use of "telecommunications line" was an attempt by Parliament to emphasize the transmission and receiving elements of such a line, as opposed to merely defining it as a transmission line. Thus, there was a reason why Parliament used the term "telecommunications line" in the submarine cable context and this reason has no bearing on subsection 43(5).

52. The MEA further submitted that the phrase "supporting structure of a transmission line" should be interpreted in the context in which it appears such that not only should "transmission line" be interpreted as a telecommunications transmission line, but "supporting structures" should be limited to telecommunications supporting structures. Thus, it is irrelevant whether cable distribution wires are already attached to some power utility poles; the power utility poles themselves are outside the Commission's jurisdiction because they are not telecommunications "supporting structures".

53. The MEA noted that subsection 43(5) was added after Second Reading of Bill C-62 without any real parliamentary discussion. Neither subsection 43(5) nor any provision similar to it appeared in the *Railway Act*, the predecessor to the *Telecommunications Act*, or in related telecommunications legislation. In the MEA's view, it is not clear on the record why the provision was added or what mischief it was meant to remedy. Whatever

the purpose, Parliament could not have intended that "transmission line" include wire transmitting raw electrical power wholly within a province or that "supporting structure" include power utility poles.

54. The CCTA argued that the alleged ambiguities raised by the MEA are nothing more than attempts to obscure the plain meaning of a simply worded provision. In the CCTA's view, there is no ambiguity in the use of the term "transmission line" and the phrase "supporting structure", and both are sufficiently broad to include power utility lines and poles.

55. The CCTA argued that the use of the more general term "transmission line" in subsection 43(5), without the qualitative adjective "telecommunications" or qualifying terms such as "of a Canadian carrier" found elsewhere in the Act, indicates that Parliament wished the term to be given its ordinary, broad meaning. If Parliament had intended to refer to a line solely for the purpose of emitting, transmitting or receiving intelligence in subsection 43(5), Parliament would have used the term "telecommunications line", as it did in the definition of "international submarine cable".

56. The CCTA submitted that the MEA's argument to the effect that "supporting structures" must be read as "telecommunications supporting structures" because power utility poles are outside the Commission's jurisdiction is circular and has no merit. In the CCTA's view, the ordinary meaning of "supporting structure of a transmission line" includes a power utility pole.

57. The MEA submitted that the phrases "highway" and "other public place" provide each other with context. In the MEA's view, Parliament intended that the type of "public place" in question share the same type of public access as that of a "highway" and, therefore, a right-of-way would not be the type of "other public place" contemplated by Parliament.

58. The MEA further submitted that, in law, a right-of-way over private land held by a municipal power utility does not confer a public right of access and is not the type of "other public place" contemplated by Parliament. In the MEA's view, the phrase "other public place" cannot be reasonably interpreted to include private land.

59. The MEA noted that many power utility poles are located on private land. The proportion of power utility poles on private land is specific to each PUC and varies tremendously. A portion of these power utility poles are located on easements granted to a PUC while others are in place pursuant to an agreement between land owners and PUCs. In its view, the application of subsection 43(5) to private places would constitute a form of illegal expropriation.

60. The CCTA submitted that, contrary to the narrow interpretation advanced by the MEA, the term "other public place" must be read in the context of subsection 43(5) and not merely in relation to the term "highway". The purpose of subsection 43(5) is to promote the sharing and efficient use of existing support structures. Given this purpose and given that Parliament is presumed to have been aware of the location of support structures on public utility rights-of-way, it would be entirely inappropriate to read "other public place" as being a location which must have the same type of public access as a "highway" as suggested by the MEA.

61. In the CCTA's view, subsection 43(5) must be given its plain meaning and interpreted as applying to support structures owned by power utilities. The CCTA submitted that if this interpretation were not adopted, there would be a significant and unjustifiable gap in the scheme established under section 43. In support of this argument, the CCTA noted, for example, that almost all poles (approximately 95%) in Alberta are owned by power utilities. In Newfoundland, power utility poles are interspersed with poles owned by the telephone company, NewTel Communications Inc., making it futile to grant access to the NewTel poles alone.

62. The CCTA submitted that, in the context of subsection 43(5), the phrase "other public place" must be taken to include public utility rights-of-way and easements. In the CCTA's view, Parliament must be presumed to know that a certain percentage of support structures owned by either power utilities or telephone companies are located on public utility rights-of-way in many provinces. The CCTA further submitted that it would make no sense for Parliament to establish a regulatory regime which would require a cable company to construct a new line of support structures on a highway when support structures with spare capacity already exist on a nearby public utility right-of-way. Under such a scenario, the Commission could grant relief in respect of the majority of the support structures but not with respect to the exceptional few. Parliament could not have intended such a haphazard access regime.

63. The CCTA further submitted that if poles on public rights-of way or easements were not included, then attachments to such poles could be subject to excessive rates and other unreasonable terms of access and could have the effect of counterbalancing the overall effect of reasonable rates and terms imposed by the Commission, contrary to Parliament's intention.

64. The CCTA also argued that a public utility right-of-way cannot be dedicated as private property in the usual sense. It is land dedicated to a public purpose; namely, the placement of public utility facilities to permit the delivery of utility services for the benefit of the public. The public purpose remains the same whether the right-of-way is statutory or consensual. Support structures located on a public utility right-of-way may be used for more than one public purpose and this does not alter the public nature of such a right-of-way. In the CCTA's view, the public purpose of a public utility right-of way renders it a "public place" for the purpose of subsection 43(5) and is consistent with the purposive interpretation of the phrase.

65. The CCTA submitted that according to the evidence of the MEA, 92% of the support structures which are subject to the agreements between the power utilities and the cable companies are located on the road allowance of highways and streets. The remaining 8% of the MEA's members' support structures are situated on property that is subject to a statutory or consensual public utility easement or right-of-way.

66. In its response to the CCTA's final submissions, the MEA focused upon the proposition that subsection 43(5) only applies to public places and not to private land. In this regard, the MEA confirmed that 92% of joint use power utility poles of 18 of the Respondents are located on the road allowances of public streets and highways.

67. The MEA submitted that the CCTA's assumption that the remaining power utility poles are set on property "which is subject to a statutory or consensual public utility right-of-

way or easement is unjustifiable and without evidentiary foundation". In particular, the MEA indicated that "some power utility poles are located on public property, but in many cases, power utility poles are located on private land without the benefit of a right-of-way or easement. In some cases specific landowners have allowed power utility poles to be located on their land without granting a right-of-way". In the MEA's view, the CCTA has attempted to gloss over the property ownership issues implicit in its proposed interpretation of subsection 43(5) of the Act.

68. In the MEA's view, allowing a government agency to order the use of private land for a public purpose is a form of expropriation. The MEA submitted that such expropriation by the Commission is allowed, pursuant to section 42, in very limited circumstances and that, in order for subsection 43(5) to be applicable to private land, federal authorities must officially expropriate the land and make it a "public" place. This, in the MEA's view, would entail fair compensation. In addition, the MEA submitted that the entire scheme of section 43 only allows the Commission to make orders concerning public land and that Parliament has specifically avoided granting the Commission expropriation powers in situations to which section 43 applies.

69. The MEA argued that public places have been defined in other contexts as places the public may go or where an invitation has been tendered for the public to enter on the land. In the MEA's view, private land occupied by power utility poles does not imply that the public has been invited to enter the land. In addition, the MEA added that a municipality is a corporate entity that is not the public and therefore, land occupied in part by municipal electric power utilities that are owned by private land owners remains private because the right-of-way does not allow other people to enter the land.

70. In addition, the MEA argued that the appropriate extent to which the parties are required to negotiate in good faith before approaching the Commission for an order is unclear.

71. The CCTA submitted that the MEA's argument relating to the degree of negotiation between the parties before approaching the Commission is both irrelevant and without merit. In this regard, the CCTA stated that there is no doubt that there were extensive negotiations on the access issue.

72. The MEA stated that it is unclear to what extent the "conditions" that the Commission would impose can cover elements of an agreement that usually would be freely negotiated between the parties. In addition, the MEA submits that it is unclear whether these "conditions" can have an impact on industries, such as the electrical power industry, that fall outside the Commission's purview.

73. The CCTA submitted that the phrase "any conditions" is unambiguous and must of course relate to access to support structures. The CCTA indicated that this phrase clearly encompasses the terms of a support structure agreement which is within the Commission's expertise. The CCTA noted that it has not requested any conditions that could be construed otherwise.

74. The MEA further submitted that there is a presumption in law that Parliament's intention with regard to a particular provision is to avoid absurd results. It is absurd to suggest that Parliament intended that the Commission "regulate" power utilities or have the power to write the entire contract for cable companies to make use of power utility poles. The MEA added that the Commission does not have the expertise to administer all of the safety

and technical standards involved in the distribution of power. Moreover, if a broad interpretation is taken of subsection 43(5), the MEA submitted that the Commission could end up regulating the access of an advertiser ("person") stringing signs near roadways to poles that support pneumatic tubes between government offices ("support structures" of a "transmission line").

75. In the CCTA's view, there is nothing absurd about the Commission having jurisdiction over the terms of access to power utility poles. Such jurisdiction does not amount to administering all of the safety and technical standards involved in the distribution of power, as advanced by the MEA. The CCTA acknowledges that safety and technical standards already exist and would need to be taken into account.

76. Furthermore, the CCTA submitted that the present application is not one where the Commission is faced with a choice between public safety and cable television service. The CCTA noted that the Applicants have asked the Commission to grant them permission to have access to the support structures of the Respondents on terms based on the agreement that was in place for a number of years prior to 1997.

4. Position of Other Parties: Constitutional and Statutory Jurisdiction

77. As noted above, in addition to the comments and reply comments received from the CCTA and the MEA, the Commission has received comments relating to the jurisdictional questions from CNP, Saskatchewan Power Corporation, TransAlta, UMG, Ontario Hydro, Telus and Stentor on behalf of BC TEL, Bell Canada and MTS NetCom Inc., as interested parties.

78. Both Saskatchewan Power Corporation and TransAlta filed, at the interim stage, brief comments supporting the position of the MEA. Although their comments were filed late, the Commission determined that they should be accepted as part of the interim relief record. While both parties reserved the right to participate more extensively on final relief, there were no submissions received at the final stage.

79. UMG took the position that the Parliament of Canada enjoys the necessary jurisdiction to enact both subsections 42(1) and 43(5) of the Act and that on correct reading, both apply to allow the Commission to impose the relief sought. Ontario Hydro submitted that the relief should be denied because the Commission would be without statutory and constitutional jurisdiction. Ontario Hydro maintained that the intent of subsection 43(5) is, clearly, to provide a remedy for a person that provides a public service which cannot gain access to the distribution facilities of a telecommunication company within the jurisdiction of the Commission. Ontario Hydro submitted that even if the federal government did have jurisdiction to enact legislation relating to a provincial electrical distribution system, subsection 43(5) of the Act does not give the Commission such jurisdiction.

80. Stentor submitted that Parliament has the constitutional authority to legislate with respect to access by Canadian carriers and distribution undertakings to support structures owned or operated by provincially regulated utilities. Stentor submitted, as well, that subsection 43(5) applies to situations in which a Canadian carrier or a distribution undertaking cannot gain access on terms acceptable to it, to support structures located on a highway or other public place owned or operated by provincially regulated public utilities.

81. Stentor suggested that the term "transmission line" in subsection 43(5) should be interpreted to mean a telecommunications transmission line. This interpretation would be internally consistent with the entirety of section 43. Canadian carriers and distribution undertakings construct telecommunications transmission lines, not electrical transmission lines. Accordingly, a fair interpretation of subsection 43(5) is that if a support structure of an electrical utility is constructed on a highway or other public place, a person who provides services to the public (i.e., a federally regulated Canadian carrier or distribution undertaking or other public utility) requiring access to such a structure to support a telecommunications transmission line may apply to the Commission for access if such a person cannot gain access on acceptable terms.

82. Stentor submitted that subsection 43(5) is, in pith and substance, legislation "in relation to" federal works and undertakings and telecommunications, and that it may validly affect issues of property and civil rights within a province. In this regard, Stentor noted that subsection 43(3) and its predecessors have long done so with respect to municipalities and submits that there is a clear and rational connection between a valid purpose of the Act and the need for access to support structures. Accordingly, Stentor submitted that subsection 43(5) of the Act is valid federal legislation, notwithstanding its incidental effect on property and civil rights within a province.

83. Stentor added that while it is clear that the Commission has jurisdiction to address disputes regarding access to support structures, it would be inappropriate to conclude that the Commission should regulate the provision of access to support structures owned or operated by the municipal utilities on an ongoing basis. In Stentor's view, subsection 43(5) was intended to provide the Commission the ability to resolve disputes on a case by case basis, as the National Transportation Agency and its predecessor agencies had done under provisions analogous to subsection 43(4) in the *Railway Act* and prior to the coming into force of section 104 of the *Telecommunications Act*.

84. Telus submitted that the term "transmission line" in subsection 43(5) was intended to mean a telecommunications transmission line. Hence, in its view, any supporting structure which carries a telecommunications transmission line falls within the Commission's jurisdiction under subsection 43(5). The broad language used in that subsection indicates that it is intended to deal with supporting structures upon which telecommunications lines are carried irrespective of the ownership of the supporting structures.

85. Telus also noted that the Commission is guided by the objectives enshrined in section 7 of the Act, including: to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions, to render reliable and affordable telecommunication services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; and, to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications. In Telus' view, the adoption of a restrictive interpretation of subsection 43(5) where only supporting structures owned by Canadian carriers would be subject to the Commission's jurisdiction would be contrary to the broad language of the provision and would deprive the Commission of the means to fulfil the very objectives of the Act.

86. Telus indicated that there are no cases[5] applying the doctrine of interjurisdictional immunity to federal laws in order to protect provincially incorporated companies or provincially regulated undertakings from the extension of federal laws to the status or

essential powers of these undertakings. Telus submitted, however, that it is difficult to see how subsection 43(5) of the Act would be regarded as affecting the status or essential powers of the provincially regulated power utilities. In Telus' view, the constitutional analysis ought to focus on whether the Act may have an incidental or ancillary effect on a provincial undertaking.

87. Telus submitted that the Act is clearly legislation in relation to a matter of federal competence and that, if subsection 43(5) is valid federal legislation that is in "pith and substance" a law that is in relation to a matter within the competence of Parliament, it may validly have an incidental effect upon property and civil rights within a province. On fair reading, subsection 43(5) would only affect provincial poles that have already been used to carry transmission lines. The right that is granted is merely access, not an easement, and presumably does not interfere with the operation of the power poles. This, in Telus' view, amounts to a very minor encroachment. Accordingly, the test for determining how necessary the impugned provision is to the otherwise valid legislative scheme involves determining whether there is a rational, functional connection between subsection 43(5) and the valid part of the Act, which is the regulation of telecommunications and the deployment of transmission lines.[6] In this regard, Telus submitted that access to supporting structures already carrying transmission lines is rationally and functionally connected with the regulation of telecommunications and concluded that subsection 43(5) is valid federal legislation notwithstanding its incidental effect upon property and civil rights within a province.

5. Analysis and Conclusion on Jurisdiction

88. The Commission has carefully considered the submissions made by the parties with regard to its constitutional and statutory jurisdiction. Although the facts giving rise to this application differ from those in the UMG v. Ontario Hydro matter, many of the jurisdictional arguments raised in this proceeding are similar to those raised there. Upon further consideration of these arguments in this proceeding, the Commission has, to some extent, made a final determination that is identical to the preliminary findings outlined in the UMG v. Ontario Hydro interim decision. The Commission's determination on its statutory and constitutional jurisdiction is set out below.

5.1 Constitutional Jurisdiction

89. Pursuant to subsection 52(1) of the Act, the Commission may, in exercising its powers and performing its duties under the Act, determine any question of law. In light of the applicable case law, such an express power enables the Commission to examine and rule upon the constitutional validity of a statute that it is called upon to apply.[7] If the Commission considers that a provision is constitutionally invalid, it can treat the statutory provision as having no force and effect.

90. In order to properly assess the validity of subsection 43(5), it is necessary to first proceed to the determination of the content or subject matter of the law in order to properly characterize the "pith and substance" of the provision and assess whether it is in relation to a matter within federal jurisdiction. The characterization of the law involves not only considering the legal effect of the provision but also inquiring into the purpose the statute was enacted to achieve.[8]

91. Pursuant to section 47 of the Act, the Commission must exercise its powers and perform its duties under the Act and any special Act with a view to implementing the Canadian telecommunications policy objectives outlined in section 7 of the Act. The Commission considers that there is a direct relationship between the policy objectives and the underlying purpose subsection 43(5) is designed to achieve. In particular, the Commission notes that, pursuant to section 7, it is to exercise its powers under the Act with a view to implementing, amongst others, the following objectives: to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada; to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; to enhance efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; and, to respond to the economic and social requirements of users of telecommunications services.

92. The Commission is of the view that subsection 43(5) of the Act is a validly enacted provision within the legislative authority of the Parliament of Canada. It provides a statutory remedy to distribution undertakings, Canadian carriers and other persons who provide services to the public. It applies in circumstances where those undertakings have been unable to negotiate terms and conditions, acceptable to them, which would allow them to gain access to supporting structures located on a highway or other public place in order to install or maintain new and existing plant. The Commission considers that subsection 43(5) of the Act is properly characterized as being designed to encourage joint use of existing supporting structures in order to facilitate the efficient deployment of the distribution plant of cable distribution undertakings, Canadian carriers and other persons who provide services to the public. The Commission considers that this provision applies when the applicant or, the respondent or both are federal undertakings contemplated by either the *Telecommunications Act* or the *Broadcasting Act*.

93. The Commission considers that section 43 provides a comprehensive legislative scheme in that it contemplates not only the construction of transmission lines but also access to existing supporting structures. It is of the view that the inability of Parliament to put into place a comprehensive legislative scheme in order to allow for the orderly deployment of distribution networks and the efficient joint use of existing support structures located on a public place, by either a cable distribution undertaking or a Canadian carrier, would affect a vital and essential part of the management, location, design and operation of those federal undertakings. Subsection 43(5) ensures that support structures are shared whenever possible, thereby avoiding unnecessary expense and public inconvenience.

94. The Commission has determined that subsection 43(5) of the Act is, in pith and substance, legislation in relation to a matter of federal competence, namely federal works and undertakings. Parliament's exclusive jurisdiction over broadcasting (including cable distribution) has been clearly established by the courts.[9] Pursuant to those authorities, a cable distribution system is part of an indivisible communications undertaking within the legislative competence of Parliament. Similarly, the Courts have found that Parliament has exclusive jurisdiction over interprovincial and international telecommunications undertakings, including companies who operate in a single Province but whose undertakings extend beyond the limits of the Province through their interconnection with the public switched telephone network or otherwise.[10] Because distribution undertakings provide both broadcasting and telecommunications services, these undertakings are subject to federal jurisdiction under both aspects of their dual nature.

95. The Commission considers that subsection 43(5) is integral to the federal legislative scheme relating to broadcasting distribution and telecommunications. The communications system of a distribution undertaking, including the coaxial or fibre optic cable and associated equipment, represents a fundamental element of the undertaking's operation in broadcasting and telecommunications. Without the communications system, a distribution undertaking cannot provide services to the public or meet its obligations under the *Broadcasting Act*. A distribution undertaking must have access to support structures in order to maintain and upgrade existing plant as well as extend its system to new customers and service areas. Such maintenance, upgrades and service extensions are required to meet the Applicants' existing regulatory obligations under the *Broadcasting Act*, as well as to permit the Applicants to compete effectively in the supply of broadcasting and telecommunications services. Contrary to the MEA's suggestion, the communications system forms an integral and indivisible part of the undertaking's operations whether in broadcasting or telecommunications. Furthermore, the denial of access to supporting structures may force the distribution undertaking to discontinue its service to the public which it is licensed to serve or result in the unnecessary duplication of supporting structures, the cost of which would ultimately be borne by subscribers.

96. In the Commission's view, the transmission lines of a distribution undertaking are a vital part of its operations just as they are a vital part of a telephone company.[11] As noted by Martland J. in the Supreme Court of Canada's decision in *Quebec (Commission du salaire minimum) v. Bell Telephone Co. of Canada*[12], an undertaking is not a physical thing, but is an arrangement under which physical things are used and, where matters are a vital part of the operation of an interprovincial undertaking as a going concern, such matters are subject to the exclusive legislative control of the federal Parliament.

97. As noted by Telus, under the pith and substance doctrine, a law that is classified as being "in relation to" a matter within the competence of the enacting body may have an incidental or ancillary effect on matters outside the competence of the enacting body. With respect to these incidental or ancillary effects, legislative power is concurrent rather than exclusive, but the presence of valid federal legislation will in any event force out provincial legislation through principles of paramountcy. Under this analysis, if subsection 43(5) of the Act is, in pith and substance, legislation "in relation to" a matter of federal jurisdiction, it may validly affect issues of property and civil rights within a province.[13] The Commission notes, for instance, that although the Respondents are regulated under provincial legislation, certain aspects of their activities may be subject to the jurisdiction of Parliament on the basis that the matter is integral to federal jurisdiction.[14] The existence of valid provincial jurisdiction over intraprovincial power utilities does not render them immune from valid federal legislation in the present circumstances.

98. The powers conferred on the Parliament of Canada under subsections 91(29) and 92(10) of the *Constitution Act, 1867* have been widely construed in relation to the purpose and the interests which the federal legislation is formulated to achieve. For example, Parliament's jurisdiction over federal undertakings has been consistently found by courts to include the jurisdiction to confer upon them the right to enter upon the streets and highways of municipalities, without their consent, in order to construct conduits, lay cables or erect poles.[15] The jurisprudence relating to similar subsections in predecessor legislation is particularly relevant and is clearly applicable to the present legislative scheme found under section 43.

99. The Commission considers that the impugned subsection is not in relation to the intraprovincial generation or distribution of electricity, which is a matter within provincial jurisdiction as a "local works and undertakings" within subsection 92(10) of the *Constitution Act, 1867*.[16] Legislation which seeks to foster and promote the efficient joint use of poles by federal undertakings is not a colourable attempt to regulate the municipal power utilities' core activities.

100. The Commission is also of the view that the provincial legislative scheme pertaining to municipal power utilities does not displace, but in fact can stand side by side with, the authority conferred upon the Commission by Parliament in section 43 of the Act. Even if there was an inconsistency between the two statutes, subsection 43(5) would be paramount. The Commission, however, considers that no such inconsistency exists in the present case since providing access to the support structures of municipal power utilities represents an ancillary function of these entities. The application of subsection 43(5) does not involve encroaching upon their core activities. Electrical distribution systems have operationally been able to coexist for many decades on the same poles that support distribution and telephone plants.

101. The Commission acknowledges that subsection 43(5) could result in some degree of interference with the contractual or proprietary rights of the public utilities. As submitted by Telus and the MEA, the appropriate test to be applied in determining whether a federal law may validly affect a provincial matter will depend on the degree of encroachment upon the provincial matter. In this regard, the MEA noted that this involves adducing considerable evidence of the degree to which a provision in question affects provincial powers. While the MEA has asserted that the application of subsection 43(5) would result in a significant encroachment into provincial matters, it has not provided the evidence to establish the degree of encroachment which it alleges, despite the opportunity given it to do so in this proceeding.

102. The Commission notes that the "interference" or "encroachment" upon public utilities is limited on the face of the present legislation. In particular, subsection 43(5) only applies where the parties are unable to agree on the terms of a joint use arrangement, only with respect to a right of access to the supporting structures of a transmission line constructed on a highway or other public place, and only for the purpose of providing services to the public. As submitted by Telus, the right that is granted is merely one of access to supporting structures, not an easement, and presumably does not interfere with the operation of the electrical poles. If the Commission must intervene and set terms of access to power utilities' supporting structures, it would necessarily do so in a manner that would not prevent the transmission of electricity in a safe and technically acceptable manner.

103. The Commission agrees with Stentor that it would be inappropriate to conclude that Parliament intended to authorize the Commission to regulate the provision of access to support structures owned or operated by municipal power utilities on an ongoing basis. On plain reading of subsection 43(5) and on the basis of the context in which subsection 43(5) is found, subsection 43(5) is intended to provide the Commission the ability to resolve disputes on a case by case basis.

104. Given the above, the Commission is of the view that any encroachment is of a minor nature. As noted by Telus, the test to be applied to determine how necessary the impugned provision is to the otherwise valid legislative scheme will depend on the degree of encroachment on provincial powers. For minor encroachments, the rational functional

test is appropriate; for major encroachments, a stricter test as to whether the provision is truly necessary or essential will apply.

105. The Commission considers that there is a rational and functional connection between a valid purpose of the Act and the need for access to supporting structures. Furthermore, because subsection 43(5) provides a less intrusive alternative to the construction rights contained in the legislative scheme under section 43, the Commission considers that subsection 43(5) is truly necessary or essential to facilitate the efficient and orderly development of a telecommunications system in accordance with the *Telecommunications Act* and the Canadian telecommunications policy objectives.

106. In light of the above, the Commission has concluded that subsection 43(5) of the Act should not be adjudged to be invalid, inapplicable or inoperable.

5.2 Statutory Jurisdiction

a. Approach to Statutory Interpretation

107. The Commission considers that the terms and phrases in subsection 43(5) must be interpreted based on their ordinary meaning as well as the context of the Act as a whole. It is a well-known principle of statutory interpretation that the words of a statute are to be given their ordinary meaning unless the context requires otherwise.[17] Furthermore, the generally accepted approach to statutory interpretation requires that a statutory provision be read in the context of the whole Act, bearing in mind the purpose and the scheme of the Act. This purposive approach has been described as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Act.[18]

108. This rule has evolved into what is now known as the "modern rule" whereby one must determine the meaning of the legislation in its total context having regard to the purpose of the legislation, the consequences of the proposed interpretations, the presumptions and special rules of interpretation and admissible external aids.[19] An appropriate interpretation is said to be one that can be justified in terms of its compliance with the legislative text or its plausibility, its promotion of the legislative purpose or its efficacy and its acceptability in leading to an outcome that is just and reasonable.[20]

109. Furthermore, the Commission notes that section 12 of the *Interpretation Act* provides that "every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

110. The Commission has examined the various submissions relating to the interpretation of the words and phrases contained in subsection 43(5) bearing these various principles in mind.

b. Legislative History

111. Sections 42 and 43 are two of a number of provisions included in a part of the Act entitled "Construction and Expropriation Powers" (sections 42 through 46). Section 54 of the *National Telecommunications Powers and Procedures Act* was the immediate predecessor

to section 42, although a similar provision has been in existence in one form or another in the *Railway Act* since 1888. Predecessor provisions to subsections 43(1) to (4) of the Act were contained in the *Railway Act* and courts have interpreted those provisions broadly.[21] There are no predecessors to subsection 43(5) in the previous legislation. In order to construe this provision in its proper context, in light of the mischief the subsection was intended to address, a review of the submissions, reports and debates leading to the adoption of section 43 of the *Telecommunications Act* in 1993 [formerly *Bill C-62, An Act Respecting Telecommunications* (Bill C-62)], while not determinative, is helpful.

112. The questions relating to the joint use of support structures and access to rights-of-way were addressed as early as 1991 by the Local Networks Convergence Committee appointed under the authority of the Minister of Communications. The Committee developed recommendations for changes in government policy and regulation to govern the future evolution of the local telecommunications network infrastructure, and the increasing convergence of the services and markets of telephone companies and cable operators.

113. The Committee's report stated that Government policy, regulation and industry practice have long recognized that there are good economic, environmental and aesthetic reasons for sharing support structures between the telephone and cable industries, as well as others, notably electrical power utilities.[22] The report noted that regulatory intervention was required in the early days of the cable industry to order telephone companies to make their support structures available to cable operators on reasonable terms.[23] It also indicated that telephone companies have entered into agreements with electrical utility companies to ensure that support structures are efficiently shared in the provision of electrical power and telephone services. In the Committee's view, the duplication of aerial support structures was not economically efficient and could have adverse environmental and aesthetic impacts. The report noted the fact that most electrical and telephone support structures were in place before the emergence of the cable industry and further noted the increased importance of ensuring that measures would be taken to make support structures available to the cable industry. It noted that, while the cooperative arrangements relating to the joint use of support structures had been of value in permitting the sharing of support structures, there was room for improvement. It stated that joint-use arrangements between power utilities, telephone companies and cable operators had successfully precluded the construction of duplicate infrastructures in many areas.

114. The report included a number of recommendations relating to the sharing of support structures:

> 7. **Canadian policy and regulation should continue to promote the sharing of support structures by telephone companies, cable operators and other support structure providers.** In this regard, the concept of support structures should be defined more broadly in the future, taking into account new technologies such as fibre optic cables, for which sharing arrangements can improve the efficiency of the local network infrastructure.
>
> 8. Government policy and regulation should not prevent the development of joint ventures between telephone companies and cable operators that are aimed at achieving more effective and efficient sharing of support structures.

> 9. **Telephone companies and cable operators should, in conjunction with electrical power utilities, and other providers of support structures, establish better cooperative mechanisms to plan the shared construction and use of support structures. Where necessary, regulators should intervene to ensure that such cooperative mechanisms are developed and implemented and that they function effectively.**[24] (emphasis added)

115. The report also addressed issues relating to ensuring that cable operators are granted a legal right of access to rights-of-way for the purposes of installing their transmission lines and associated support structures. Representatives of the cable industry had advocated the importance of such rights in situations where access to support structures of telecommunications common carriers, electric power utilities and other providers of support structures was unavailable. Telephone company representatives had expressed concerns that such a right of access to rights-of-way would lead to duplication of support structures. The cable industry had agreed that a right of access on its part to public rights-of-way should only arise if suitable support structures were not available on reasonable terms. The report underlined the importance of joint use of structures as the primary course of action as follows:

> In order to prevent unnecessary duplication of support structures, as well as potential environmental disruption and aesthetic problems, government policy and regulation should continue to require cable operators to negotiate with other potential suppliers of support structures to obtain suitable facilities. However, where these negotiations are unsuccessful, it would be reasonable to grant cable operators similar rights of access to public rights of way as telephone companies. At the federal level, these rights, which are currently set out in the *Railway Act*, are proposed to be simplified and updated by means of clauses 48 and 49 of Bill C-62.[25]

116. The Committee concluded its remarks with the following recommendation:

> 10. Cable operators should have the same rights of access to public rights of way as federally regulated telephone companies in circumstances where suitable support structures are not available to them on reasonable terms and conditions from telephone companies, electric power utilities or other providers of support structures.[26]

117. Prior to tabling Bill C-62 before the House of Commons, the Senate Committee on Transport and Communications undertook to pre-study its subject matter. The submissions made on behalf of the cable companies raised the question of providing them with the same rights of access as telephone companies. With respect to these concerns, the Senate Committee recommended:

> We further recommend that the cable industry should be entitled to the construction powers to be granted all federally-regulated telecommunications carriers, by way of a consequential amendment to the *Broadcasting Act*.[27]

118. Following the Senate Committee's report, there were no provisions relating to construction and access by distribution undertakings in Bill C-62. At First Reading in the House of Commons, the provisions relating to construction powers applied only to "Canadian carriers" and not to distribution undertakings. There was no reference to access to supporting structures.

119. Following Second Reading, submissions were made before the House of Commons Sub-Committee on Bill C-62 of the Standing Committee on Communications and Culture. Several submissions before this Sub-Committee addressed the need to grant the same rights of access to rights-of-way to cable operators as those provided for telephone companies. These emphasized the need to clearly define cable's access to public rights-of-way to include the same recognized legislative power to access public roadways and places as is currently enjoyed by telephone companies in view of the new competitive environment. The submissions specifically referred to access being frustrated or instances where the support structures are unavailable and no other alternative is available to resolve the problem. While such a right of access was said to be implicit under the *Broadcasting Act* in view of the legal duty to make service available to each household or premise within its licensed service area, the cable operators underlined the importance of having an express right, in view of the increasing convergence and competition in the market. The provinces, on the other hand, raised concerns about a proliferation of undertakings trying to "dig up highways".

120. The Minister of Industry proposed to the Commons Sub-Committee to amend the provisions in the following manner:

> If the subcommittee agrees, clauses 48 and 49 [now sections 43 and 44 of the Act], will be amended so that they apply equally to broadcasting distribution undertakings as defined under the *Broadcasting Act*. In addition, we will propose an amendment to clause 48 of the bill that will provide for efficient use, by those serving the public, of support structures constructed on public rights of way and require the CRTC to take account of all uses of the right-of-way or other public place prior to issuing any orders under this clause.

121. Accordingly, the section was amended to include reference to distribution undertakings in subsections 43(1)[28] to (4), and subsection 43(5) was added in its entirety. The amendments were adopted on Third Reading without any further discussion.

122. Based on the concerns expressed and the comments and recommendations made prior to the addition of subsection 43(5), the Commission is of the view that the underlying intent in adding that provision was to ensure that the granting of construction rights to Canadian carriers and distribution undertakings to build their own infrastructure did not represent the only alternative available to these undertakings where a more efficient use of existing support structures could be made available.

123. The Commission also considers that such an intent can be reasonably inferred from the fact that the exercise of construction rights by Canadian carriers and distribution undertakings is not an unfettered power. Such powers are subject to not "unduly" interfering with "the public use and enjoyment of the highway or other public place" and must be exercised upon obtaining consent from the municipality or other public authority having jurisdiction. Furthermore, where consent is not available and the Commission

intervenes, the Commission must have due regard to the use and enjoyment of the highway or other public place by others. In the Commission's view, the pre-existence of supporting structures would be a consideration relevant to the granting of a permission to construct a separate infrastructure. In this respect, it may be said that subsection 43(5) provides a natural complement to subsections 43(2) to 43(4) of the Act.

124. The Commission is of the view that it is reasonable to conclude that the legislative history leading to subsection 43(5) lends support to the proposition that subsection 43(5) was added to address concerns relating to the granting of construction powers which could lead to unnecessary construction on highways and other public places. The legislative history lends support to the proposition explored below, that it is appropriate to construe this subsection broadly to include the supporting structures of all utilities, including electrical power companies. By allowing access to existing supporting structures irrespective of the type of utility owning or controlling such a structure, the adverse environmental, economic and aesthetic impact associated with unnecessary duplication of aerial supporting structures is avoided.

c. Canadian Telecommunications Policy and Other Public Interest Concerns

125. As noted previously, the Commission must, pursuant to paragraph 47(a) of the Act, exercise its powers and perform its duties under the Act with a view to implementing the Canadian telecommunications policy objectives outlined in section 7. Therefore, in interpreting the scope of subsection 43(5), the Commission must have regard to implementing these policy objectives.

126. The Commission notes that there are a number of considerations relating to supporting structures which should be evaluated in light of section 7 of the Act:

(1) The failure to facilitate the orderly development of Canada's telecommunications system would appear to be contrary to the objectives of paragraph 7(a) (strengthening the economic fabric of Canada and its regions);

(2) If duplicate infrastructures are financed and constructed despite the added costs, unnecessary capital and operational costs would ultimately have to be borne by subscribers. Such a result would appear to be contrary to the objectives of paragraph 7(b) (affordable telecommunications services);

(3) The capital costs inherent in the construction of duplicate infrastructures may operate as a barrier to entry and a disincentive for the deployment of networks which are essential to an information-based society and economy. Such a result would appear to be contrary to the objectives of paragraphs 7(a), 7(c) (to enhance the efficiency and competitiveness of Canadian telecommunications) and 7(f) (to foster increased reliance on market forces for the provision of telecommunications services);

(4) The development of duplicate infrastructures also raises the prospect of considerable inconvenience to the public as crews from various service providers go about deploying, maintaining, and altering their separate networks near or under Canadian streets, highways and other public places according to their own schedules. These consequences would appear to be contrary to the objectives of paragraphs 7(c) and 7(f).

127. Historically, the support structures of Canadian electrical power utilities have constituted an important element of Canada's telecommunications system and an important component required for the delivery of broadcasting services to the Canadian public. Interpreting subsection 43(5) as extending to the supporting structures of electrical power utilities would be consistent with the attainment of the objectives of Canadian telecommunications policy, including facilitating the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions.

128. The Commission has recognized the public interest in the sharing of support structures at least since 1977.[29]

129. Furthermore, as a result of the telecommunications policy objectives, and particularly paragraph 7(f), the Commission has undertaken a course of regulatory action in order to implement a regulatory framework which places greater emphasis on market forces and competition.[30] Similarly, under its jurisdiction pursuant to the *Broadcasting Act*, the Commission has implemented a framework to encourage competition in the distribution of broadcasting services.[31] As a result of competition and the emergence of additional industry players, there will be growing pressures with respect to the construction of new communications support structures and use of existing structures.

130. In Decision 95-13, the Commission clearly stated its policy with respect to joint use of support structures as follows:

> The Commission is of the view that it is in the public interest to minimize the number of support structures (poles and conduit) through joint use of those structures, regardless of their ownership. Moreover, the Commission expects that maximizing the use of support structures (in terms of the number of companies using each structure) will help facilitate interconnection and interoperability between Canadian carriers and cable television undertakings. [...]
>
> With respect to the issue of joint ownership of support structures, the Commission notes that, historically, many telephone companies and power companies in Canada have participated in arrangements where each partner contributed to the capital investment. Thus, in some arrangements, the partners have joint ownership of the structure. In such situations, each participant has had a measure of control and influence over the provisioning of the structures. The Commission is of the view that these arrangements appear to have functioned adequately, and sees merit in parties, including cable television undertakings, seeking access to a large number of structures entering into arrangements where they would share in the capital investment and maintenance costs.

131. The construction of distribution infrastructures is required in order to provide telecommunications and broadcasting services to the public. In the Commission's view, an approach that forces each operator to construct its own duplicate infrastructure is not in the public interest. The Commission believes that the development of a proper distribution infrastructure will be as important to the Canadian economy in the 21st century as was the construction of a railway infrastructure in the 19th century.

132. In addition to the policy objectives of the Act, the Commission notes that Parliament has declared at subparagraph 3(1)(t)(ii) of the *Broadcasting Act* that distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable costs. The Commission notes that there may also be detrimental environmental and aesthetic consequences linked to the construction of avoidable duplicate infrastructures, particularly with respect to aerial transmission lines. Therefore, apart from the objectives declared by Parliament in the Canadian telecommunications policy, efficient use of existing supporting structures appears to be consistent with the broader public interest.

d. Interpretation of "person who provides services to the public"

133. The MEA argues that subsection 43(5) does not apply to distribution undertakings. The MEA notes that Parliament used the expression "person who provides services to the public" in subsection 43(5) rather than "Canadian carriers" and "distribution undertakings" which are used in the related provisions of sections 42 and 43, and suggests that there is an inconsistency between the word "person" in the English version and the use of "fournisseur" in the French version. The MEA concludes that subsection 43(5) was enacted in order to allow non-broadcasting entities to gain access to the poles Canadian carriers and distribution undertakings were given the power to construct under sections 42 and 43.

134. The Commission considers that the MEA's argument cannot be sustained. Clearly, distribution undertakings provide services to the public. The use of the term "fournisseur" clearly denotes a service provider when read in the context of subsection 43(5). Given the legislative history, the policy objectives of the Act, the plain wording of the subsection and the rest of section 43, the Commission considers that subsection 43(5) provides a statutory remedy to cable distribution undertakings as well as to Canadian carriers and other persons who provide services to the public as part of a comprehensive legislative scheme designed to allow for the orderly deployment of the distribution plant of these entities and the efficient joint use of existing support structures located on a public place. It is the Commission's view that any interpretation of the expression "person who provides services to the public" that excludes distribution undertakings would negatively affect these federal undertakings and would be contrary to Parliament's intent.

e. Need for Prior Negotiation

135. With respect to the appropriate degree to which the parties have to attempt to negotiate before bringing a dispute to the Commission, the Commission is of the view that there is no explicit or implicit statutory requirement to that effect.[32] The Commission considers that subsection 43(5) of the Act applies in circumstances where a cable operator is unable, on acceptable terms, to gain access to supporting structures pursuant to an initial support structure agreement. The subsection would also be applicable where, despite the existence of an agreement, the person seeking access is in fact unable to gain access on acceptable terms or is otherwise unable to restore a previous contractual relation.

136. The Commission considers that it is generally sound policy to require the parties to proceed to good faith negotiations prior to seeking a Commission determination. In particular, the Commission's decision of 27 March 1997, which instituted a non-binding dispute resolution process, illustrates the Commission's desire to see prior negotiations

occurring. In the Commission's view, it is clear, in this case, that there have been extensive negotiations, that further negotiations will not be fruitful and that the Applicants are unable to gain access on terms acceptable to them.

f. Interpretation of "any conditions that the Commission determines"

137. With respect to the MEA's suggestion that the Commission's jurisdiction to set conditions of access is unclear and perhaps limited, the Commission is of the view that the phrase "any conditions that the Commission determines" is unambiguous and sufficiently broad in scope to allow the Commission to set rates, terms and conditions of access to supporting structures.

138. The Commission acknowledges that Parliament did not intend the Commission's jurisdiction to include the ongoing regulation of the rates, terms and conditions applicable to the use of support structures owned by municipal power utilities but rather, provided the Commission the ability to resolve disputes on a case by case basis.[33] Furthermore, it is the Commission's view that the terms of access imposed by the Commission in the resolution of such disputes should continue to apply until the parties can agree otherwise.

139. As noted previously, the Commission considers that the conditions attached to a permission granted under subsection 43(5) must, by necessity, be drafted so as to not prevent the power utility's poles from being used in a safe and technically acceptable manner. This is consistent with the approach taken by the Commission previously in relation to the terms of access to telephone company support structures as stated in Decision 95-13:

> The Commission is of the view that the owners of support structures have the right to set and enforce construction standards, provided that those standards are based on safety and technical requirements and do not unreasonably impede access by other telecommunications carriers and cable television undertakings.

g. Interpretation of "transmission line"

140. With respect to the MEA's submission that the use of the phrase "transmission line" refers to a transmission line of a telecommunications common carrier or a distribution undertaking rather than the power line of a public utility, the Commission is of the view that the use of the phrase is sufficiently broad to include electrical transmission lines. The Commission has based its determination upon the ordinary meaning of the phrase as well as upon reading the words in the context of section 43 and the Act as a whole, bearing in mind the purpose and the scheme of the Act.

141. The Commission notes that the Act does not provide a definition of "transmission line". The Commission notes the following dictionary definitions of "transmission line" or "ligne (de transmission)":

> transmission line, a conductor or set of conductors designed to carry electricity (esp. on a large scale) or electromagnetic waves with minimum loss and distortion; [The Oxford English Dictionary, Second Edition]

transmission line: a metallic circuit of three or more conductors used to send energy usu. at high voltage over a considerable distance; specif. : a usu. metallic line used for the transmission of signals or for the adjustment of circuit performance and often consisting of a pair of wires suitably separated, a coaxial cable, or a wave guide. [Webster's Third New International Dictionary, 1981]

ligne: III [...] 3° Système de fils ou de câbles conduisant et transportant l'énérgie électrique. Ligne à haute tension. - Spécialt. Ligne électrique assurant les communications par télégraphe ou téléphone. [Le Petit Robert, 1988]

142. Based on these definitions, it may be reasonably concluded that the ordinary meaning of "transmission line" or "ligne de transmission" includes, in addition to the transmission lines of telecommunications common carriers and of cable distribution undertakings, the transmission lines used to distribute electrical power.

143. In addition, the Commission is of the view that such an interpretation is consistent with the fact that elsewhere in the Act the expression "transmission line(s)" is narrowed by being qualified as the transmission line of a Canadian carrier or a distribution undertaking.[34] This is particularly relevant in section 43, where subsections 43(2) to (4) contain such a qualification while subsection 43(5) does not.

144. The Commission also notes that Parliament has used the apparently narrower expression "telecommunications line" when it defined, at subsection 2(1) of the Act, the term "international submarine cable".

145. Consistent with the Commission's finding that the words "transmission line" include electrical transmission lines, the Commission is of the view that the expression "supporting structure of a transmission line" in subsection 43(5) is intended to deal with supporting structures carrying transmission lines including the supporting structures owned or controlled by electrical power utilities.

146. The CCTA submitted in its intervention that Parliament must be taken to have been aware of certain facts relating to the ownership of support structures in Canada when the Act was enacted. The Commission notes that cable distribution undertakings have made use of support structures of power utilities since the 1950s. In addition, the poles of power utilities currently constitute a significant component of the distribution networks of both cable and telephone companies across the country. For instance, the CCTA indicated that in Alberta almost all the supporting structures are owned by the power utilities. The CCTA also indicated that in Newfoundland there is a high level of mixed ownership of the poles used to support transmission lines, such that in any stretch of poles some may be owned by NewTel Communications Inc. (formerly Newfoundland Telephone Company Limited) (NewTel), and others by Newfoundland Power. The CCTA argued that it would make it futile to grant access only to the poles owned by telephone companies. In the Commission's view, Parliament could not have intended such a haphazard access regime.

147. Telus' interpretation of subsection 43(5) to the effect that it is intended to deal with situations where telecommunications transmission lines are already occupying support structures is overly restrictive, contrary to the Canadian telecommunications policy objectives and inconsistent with the ordinary meaning ascribed to subsection 43(5). Such a restrictive interpretation would create a barrier to entry for new competitors in both cable

distribution and local telephony, thereby favouring incumbent service providers such as Telus. New entrants would be forced to exercise their construction rights under subsections 43(2) to (4) of the Act in order to build a duplicate network. Therefore, the Commission rejects the narrow alternative interpretation that would require the "telecommunications" transmission lines to be present on the support structures before an application for a right of access can be made pursuant to subsection 43(5).

148. In the Commission's view, the language found in subsection 43(5) is sufficiently broad to mean any existing support structure carrying any type of transmission line. Furthermore, such an interpretation is entirely consistent with section 43 and the Act as a whole. Section 43 of the Act establishes a complete legislative scheme to enable Canadian carriers and distribution undertakings to construct, operate and maintain their transmission lines. Subsections 43(2) through 43(4) deal with situations where it is necessary to construct support structures. Subsection 43(5) addresses the situation where support structures carrying transmission lines already exist. In the Commission's view, to suggest that access under subsection 43(5) is limited to support structures carrying only certain types of transmission lines or support structures owned or operated by certain entities would not only be contrary to the words read in their ordinary sense but would also create an unjustifiable gap in the legislative scheme found in section 43. In view of the object of section 43 and the policy objectives in section 7, the Commission concludes that the phrase "supporting structure of a transmission line" must be interpreted to mean any supporting structure that serves to carry a transmission line and that already exists. The Commission considers that this interpretation is consistent with the public interest and the objectives of the Canadian telecommunications policy.

h. Interpretation of "highway or other public place"

149. The Commission does not accept the MEA's argument that the expression "other public place" must be interpreted narrowly because it follows the word "highway". The MEA's interpretation would mean that "other public place" would have to be in the nature of a highway or something similar and would exclude poles located on a public utility right-of-way. Contrary to the narrower contextual approach suggested by the MEA, the Commission is of the view that, in accordance with generally accepted principles of statutory interpretation, the contextual approach would require the term "other public place" to be read in the context of the whole of the subsection, the section and the Act and not merely in relation to the term "highway". Given the purpose of subsection 43(5), the section and the Act as a whole and given that Parliament must be presumed to have been aware of the location of support structures, it is entirely inappropriate to read "other public place" as being limited to a location having the same type of public access as a "highway".

150. The Commission considers that the phrase "other public place", in light of the purpose and the context of subsection 43(5) and the Act as a whole cannot be limited to land that is necessarily open to the general public. The meaning of "public place" will depend on the specific purpose and legislative context in which it is used. Private ownership is not necessarily incompatible with the conclusion that a place is public. For instance, courts have held that a privately owned property can be a public place if the public or a portion of the public can generally have access to it. For example, the *Broadcasting Act* excludes

from the definition of "broadcasting" a transmission of programs that is made solely for performance or display in a "public place". In that context, sports arenas have generally been considered public places even if privately owned and even though payment may be required for entry. In the case of the *Telecommunications Act*, there is no clearly applicable precedent.

151. The restrictive interpretation suggested by the MEA would mean that access to a string of poles would be impeded if some poles that are located on a public utility right-of-way or easement were interspersed amongst others located on a "highway". As submitted by the CCTA, this interpretation would result in a form of "jurisdictional hopscotch" in that subsection 43(5) would apply to the majority of support structures, but not to the exceptional few. This would have the effect of entirely frustrating the purpose of subsection 43(5) which is to facilitate and promote the efficient use and sharing of support structures. As noted previously, Parliament must be presumed to have been aware of the location of support structures on public utility rights-of-way or easements. The Commission considers that "highway or other public place" is broader than what the MEA would have the Commission find.

152. The Commission notes that subsection 43(5) deals with access to existing supporting structures. It is not a means to create an easement and cannot serve to create rights of entry upon property where such rights do not already exist or are expressly limited. However, for the purpose of identifying the support structures falling within the scope of subsection 43(5), and in light of the purpose and context of subsection 43(5), the expression "highway or other public place" should be read to include any public utility easement or right-of-way dedicated to the placement of public utility facilities for the benefit of the public.

153. The Commission considers that a supporting structure located on a public utility easement or right-of-way cannot be characterized as being located on purely private property. The right of a public utility in a public utility easement is a conditional right and not an exclusive private right, at the expense and detriment of the public and of other public utilities also charged with the duty of providing a service. The public interest forms an integral part of public utilities. Where one devotes its property to a use in which the public has an interest, one in effect grants to the public an interest in that use, must submit to be controlled by the public for the common good and such property ceases to be *juris privati*.[35]

154. The Commission notes that the Ontario Court of Appeal has recognized that the principle establishing an agency relationship between a public utilities commission and a municipality has existed at common law for more than a century.[36] It also notes that a statutory agency relationship may also be established under the constituting legislation creating a specific PUC. In the Commission's view, where a PUC acquires an easement, it acquires the easement as an agent for the city. It is a benefit for the distribution system, not only for the actual customers but also for the city at large.[37] Accordingly, in view of the fact that public utility easements are acquired to serve a public purpose for the benefit of the general public and not merely for the private use and purpose of individuals, the Commission finds that it is reasonable to include support structures located on public

utility easements within the scope of the expression "constructed on a highway or other public place". The fact that a public utility right-of-way is one for the benefit of the municipality at large would lend support to the use of such access rights by cable companies for the benefit of the public at large.

155. The MEA has indicated in its final submissions that some power utility poles are situated on private land without the benefit of a right-of-way or easement. In this regard, the Commission notes that the MEA acknowledges that 92% of the support structures owned by 18 of the municipal power utilities it represents are located on the road allowances of highways or streets.

156. While the CCTA has stated that the remaining 8% are situated on property which is subject to statutory or consensual public utility easements or rights-of-way, the MEA has indicated, in reply, that "some" of these poles are located on public property, "many" are on private land without the benefit of a right-of-way or easement and, in "some cases", specific landowners have allowed power utility poles to be located on their land without granting a right-of-way.

157. The Commission is of the view that, despite the fact that the MEA is in the best position to provide factual support for their submission, it has failed to provide appropriate evidence to substantiate it, choosing instead to rely on ambiguous words such as "some" and "many" to denote a subset of the remaining 8%. In addition, the Commission notes that, because this was raised at the reply stage, there was no opportunity for the CCTA to comment on the undefined proportion of the remaining 8% of the poles or the extent of this situation.

158. The Commission finds it difficult to surmise that there is no right-of-way with respect to poles, in view of the safety and maintenance requirements of such structures. In the Commission's view, the presence of support structures on private land would by necessity require the owner of the support structure to retain a means to ensure public safety and system security.

159. The Commission notes that PUCs may acquire easements in a number of ways, including transfers of easement from Ontario Hydro, purchases of easement from private land owners, easements received from owners of registered plans of subdivision, easements on lands conveyed as a condition for granting of a consent for severance or as a result of a condition imposed in a site plan control agreement between a private land owner and the Regional Municipality and by way of statutory rights of access. In the Commission's view, it would be reasonable and appropriate for the Commission to apply an evidentiary presumption that *de facto* public utility easements exist.

160. The Commission considers that the acquisition of limited rights and interests by the public utility to gain access to its support structure through easements, leases, licenses of occupation or permits is not expropriation in the sense that there is no change in ownership of the land. However, the Commission acknowledges that the acquisition of such rights may, in certain circumstances, entail compensation to the land owner, depending on inconvenience, land value, impact on property, loss of production of farm land, etc. and may be restricted to specific uses or users.

161. The Commission recognizes that, when determining the permissible uses of an easement on private land, consideration must be given to a number of circumstances in existence at the time of its creation. Such an assessment would include consideration of the reasonable expectations of the parties, taking into account the nature of the easement, its purpose, the extent of the burden on the land and their expectations as to the normal development of the user and the projected use of the easement. In the absence of evidence to the contrary (such as specific restrictive terms), it may be found that the parties anticipated changes in the future which could affect the use of the easement consonant with changed realities, such as those affecting land use patterns, or technological development.

162. It is the Commission's view that, absent specific restrictions in the terms creating the easement, the cable company's use of a public utility's right-of-way to gain access to power utility poles, being consistent with the underlying purpose of the public utility right-of-way, would not generally constitute an unauthorized enlargement and alteration in the character, nature and extent of the easements relating to the public utility's supporting structures, especially where the change in the nature or intensity of the use does not cast an unreasonable burden on the land affected. In this regard, the rights attached to each public utility easement will be dependent upon the specific terms under which they were acquired. The terms of the easements must be construed in light of the purposes for which they were intended to be used.

163. The Commission considers that terms of access to the public utility easements are beyond the scope of subsection 43(5), which relates to access to the support structures. Cable distribution undertakings may be required to negotiate with the land owner their own right of access, including compensation, where the terms of access to the public utility easement are specifically restricted in relation to the permitted use or user.

164. The Commission is of the view that it has jurisdiction to grant a remedy pursuant to subsection 43(5) of the Act, subject to any conditions that it determines are reasonable in the circumstances. In particular, the Commission notes that the Applicants are distribution undertakings within the meaning of subsection 2(1) of the *Broadcasting Act* and are persons who provide services to the public who cannot, on terms acceptable to them, gain access to the supporting structures of transmission lines constructed on a highway or other public place, as contemplated under subsection 43(5) of the Act.

B. Procedural Fairness

165. The Commission is of the view that the MEA's submissions regarding the alleged unfairness of the proceeding resulting from the staff opinion are unfounded.

166. In its final and reply comments, the MEA submitted that the staff opinion has tainted this entire proceeding with unfairness and that the CCTA relied, in large part, on the staff opinion to justify a low pole rental rate. The MEA stated that parties were directed by the Commission to participate in a dispute resolution process in an attempt to settle the dispute without a ruling from the Commission. The MEA added that parties were informed that submissions, as well as the eventual staff opinion would form part of the record placed before the Commission. The MEA further stated that the resulting staff opinion, did not take into account or even refer to the extensive oral submissions made by the MEA in an attempt to resolve the dispute. It noted that the recommended pole rental rate in the staff opinion was the same rate charged by Ontario Hydro, despite the fact that no evidence

concerning pole attachment on Ontario Hydro's poles was before the Commission or staff. The MEA submitted that, as a result, the Commission should exclude from consideration the staff opinion, and the portions of the CCTA's submissions relying on the staff opinion.

167. With respect to the MEA's complaint that the staff opinion did not take into account or refer to the extensive oral submissions made by the MEA, the Commission notes that, as confirmed by the courts, it is neither practical nor necessary for Commission decisions to repeat each and every party's arguments leading to a decision. This should be all the more so for a non-binding staff opinion arising from a less formal process. However, the Commission notes that the staff opinion was nonetheless based on all of the submissions leading to and including the dispute resolution process. Moreover, the staff opinion was not written with a view to reiterating the parties' positions which were at an impasse, but rather was designed to facilitate the reaching of an agreement between the parties with the assistance of staff's preliminary opinion on the rate issue.

168. As stated in the Commission's letter decision of 27 March 1997 which outlined the dispute resolution process, the staff opinion was meant to provide a concise report outlining staff's views on some or all of the issues that remained to be resolved. Parties were expected "to attempt, with the benefit of the staff opinion, to resolve outstanding issues". The parties could obtain clarification with regard to any matter contained in that opinion. In essence, it was to be used, calling upon staff's broad knowledge and expertise in these matters, as a tool to facilitate an agreement between the parties in an informal fashion.

169. With regard to the complaint that the staff opinion recommended the same rate as that charged by Ontario Hydro, despite the fact that no evidence concerning pole attachment on Ontario Hydro's poles was before the Commission or staff, the Commission notes that staff indicated in its opinion that, in the absence of better evidence and persuasive arguments to the contrary, it considered the Phase II causal costing approach to costing telephone company services an appropriate starting point to determine the applicable rate. Staff recognized that there may be differences in the costs incurred by power utilities with respect to support structures and, in the absence of better evidence, found the rate proposed by Ontario Hydro in its most recent model support structure license agreement to be appropriate in the context of power utility poles.

170. The Commission notes that the record of the proceeding now provides the necessary evidence for the Commission's determination of the appropriate methodology and rate without reference to Ontario Hydro's agreed rate.

171. It is to be noted that all parties were informed, in the Commission's 27 March 1997 decision suspending the application for interim relief pending the dispute resolution process, that the staff opinion was non-binding and that they would be given a full opportunity to comment on its merits as well as make further submissions, including submissions regarding the issues of constitutional and statutory authority, if the proceeding for interim and final relief was resumed.

172. The Commission further notes that, while the parties have provided comments on the staff opinion, the essence of their submissions relates to providing the groundwork and the evidence to support their own rate setting methodology. Accordingly, the Commission has focused its analysis on these substantive arguments in reaching its final recommendations.

173. For the reasons outlined above, the Commission denies the MEA's request that it exclude from consideration the staff opinion, and the portions of the CCTA's submissions relying on the staff opinion.

C. The Need for Regulatory Intervention

174. In its final comments, the MEA argued that, even if the Commission has jurisdiction under subsection 43(5), it should refrain from exercising its jurisdiction in the present case. The MEA submitted that there is competition between broadcasting distribution undertakings and telecommunications carriers and therefore, the Commission should forbear from exercising its jurisdiction under subsection 43(5). The MEA stated that, while the forbearance power provided by section 34 does not apply to section 43, subsection 34(2) of the Act provides for forbearance from regulation when sufficient competition exists to protect the public. The MEA added that if the Commission in this proceeding mandates access to power utility poles at a rate below the fair market value of the communication space, cable companies will gain a competitive advantage over their rivals.

175. The CCTA, in reply, submitted that, as acknowledged by the MEA, section 34 of the Act does not apply to section 43. Moreover, the CCTA added, the MEA's argument about forbearance conveniently neglects the public policy concerns which underlie section 43, and subsection 43(5) in particular. The CCTA added that the environmental, safety and public convenience issues associated with support structures highlight the need for regulatory oversight and the inapplicability of section 34. The CCTA further added that even if section 34 were relevant, the conditions necessary for forbearance under section 34 do not exist.

176. The MEA also submitted that the Commission should refrain from exercising its jurisdiction in the present case because there is no question of access being denied to the cable companies. The MEA added that the cable companies have merely chosen not to pay the requested price and instead asked the Commission to regulate pole attachment, despite the existence of alternatives to pole attachment available, for example by placing cables underground or distributing services by way of other technologies such as direct-to-home (DTH) satellite or "wireless cable". In reply, the CCTA stated that the dispute is about access: the MEA is demanding that the cable companies pay an annual rate of $40.53 for access to the power utility poles.

177. The CCTA submitted that the MEA's suggestion that the cable companies could place their cables underground or construct their own pole lines ignores the strong public policy in favour of sharing existing support structures. The CCTA also submitted that the respondent power utilities have an effective monopoly in the situations under dispute and, consequently, no form of market negotiation can take place. The CCTA added that regulatory oversight of the cost of monopoly inputs to competitive services is neither unusual nor inappropriate. The CCTA further added that there is nothing on the record of the proceeding to suggest that the MEA would change its position on the appropriate level of the pole rental rate if the Commission were to decline to exercise its jurisdiction under subsection 43(5).

178. The Commission notes that, as submitted by the CCTA and as acknowledged by the MEA, section 34 of the Act may only be applied in respect of those sections of the Act that are specified in section 34. Section 34 cannot apply with respect to the exercise of the Commission's powers under section 43.

179. The focus of subsection 43(5) is access to support structures. The issue is not only whether access has been denied but rather, whether access may be obtained on terms acceptable to the person who provides services to the public. The Commission is of the view that an important consideration in a decision not to grant relief under subsection 43(5) would be whether there are, in fact, alternative support structure suppliers to serve the distribution needs of the applicant seeking relief. The Commission notes that there is not sufficient competition between support structure suppliers and, further, considers that the alternatives to pole attachment suggested by the MEA are neither practical nor reasonable alternatives in the present case. The business of the applicants is to distribute television signals through cable, not through alternative distribution technologies. Indeed, the Commission has licensed them for that purpose. Further, subsection 43(5) applies in situations where access cannot be obtained on terms acceptable to the applicant and is not limited to situations where access is necessarily denied. Under the circumstances of this case, subsection 43(5) is appropriate for consideration.

180. The Commission considers that the public policy concerns which underlie section 43 and the public interest support the need for regulatory oversight. The construction of new support structures as well as access to existing support structures are matters of public concern and it is not sufficient to look at these issues as involving simply the private interests of contracting parties. The Commission also considers that all reasonable avenues to resolve this dispute through negotiation, whether with or without Commission staff participation, have been fully explored and further efforts of a similar nature are unlikely to result in a break in the impasse. Despite the time that has elapsed since the dispute arose, the parties have been unable or unwilling to reach a consensual arrangement. In light of the above, the Commission considers it appropriate to make a final determination on the final relief requested.

D. Pole Costs and Rental Rate

1. Introduction

181. In its application, the CCTA requested that the Commission grant access to support structures of the power utilities at the pole rental rate established in Decision 95-13 for the Stentor operating companies (as they then were), namely a pole rate of $9.60 per year.

182. The MEA submitted that, in the event the Commission decides to regulate access to power utility poles and set a pole rental rate, the price of access should approximate fair value as closely as possible. The MEA noted that pole rental fees affect electricity rate payers and submitted that these rate payers should not be penalized by bearing the cost of a subsidy to the cable television industry.

183. The MEA submitted that the Commission should focus its pole costing approach on the net embedded cost of poles. The MEA proposed rating models that would establish rates that would recover both the incremental costs associated with the cable companies' use of power utility poles and make a contribution to the capital costs of these support structures.

184. The CCTA agreed in principle that the cable companies should pay incremental costs and make a reasonable contribution to capital costs. However, the CCTA disagreed with the MEA's approach to the actual calculation of incremental and capital costs and, consequently, the pole rental rate.

185. In Decision 95-13, the Commission approved rates that covered incremental costs and provided a contribution to recognize fixed common costs. In the current proceeding, the Commission notes the CCTA's agreement that users of MEA members' support structures should also pay rates that recover incremental costs and provide a contribution. The Commission is also of the view, however, that determining the level of contribution requires, in this case, an examination of the MEA's evidence regarding its fixed costs.

186. The Commission notes that in the record of this proceeding, the parties focused their cost evidence on a typical 40 foot power utility pole. The Commission, therefore, bases its determinations on the 40 foot Pole Space Model submitted by the MEA. Although the Respondents' poles vary in size, the Commission's cost estimates and the resulting annual pole rental rate applies to all poles in the Respondents' territories.

2. Incremental Costs

187. The CCTA submitted that, typically, under support structure agreements, a significant portion of any incremental costs is paid by way of non-recurring charges which are specific to particular activities. The CCTA added that this has been the case for the support structure agreements between the cable companies and power utilities in the past and would continue to be so under either of the contending support structure agreements advocated by the CCTA and the MEA.

188. The CCTA considered that, in addition to these non-recurring costs, certain incremental costs can be viewed as being incurred on an ongoing basis, namely: administration costs related to the placement of the cable companies' facilities on the power utility poles and loss in productivity costs resulting from the power utility crews having to work around the cable companies' facilities. The CCTA noted that these incremental costs are typically recovered as part of the monthly pole rate. The CCTA submitted that, based on evidence filed by the telephone companies in previous Commission proceedings, administration costs for the power utilities should be in the range of $1.80 to $2.40 per year. Based on this same evidence, the CCTA added that the costs associated with loss in productivity should be in the range of $0.25 to $0.75, and total ongoing incremental costs should therefore be in the range of $2.05 to $3.15 per year.

189. The MEA provided an annual estimate of $3.15 per pole for loss of productivity in utility line work due to the presence of cable attachments on utility poles.

190. The CCTA submitted that, to the extent that the MEA's loss of productivity cost of $3.15 is intended to recover all ongoing incremental costs (i.e., both the administration and loss in productivity as those terms are used by the Commission), it considered the estimate high but reasonable.

191. The Commission notes that the CCTA and the MEA agree that loss in productivity resulting from the power utility crews having to work around the cable companies' facilities properly constitutes ongoing incremental costs that are typically recovered as part of the pole rate.

192. The Commission notes that the CCTA seeks to draw support for its proposed loss of productivity from several past analyses involving loss of productivity to telephone companies caused by the presence of cable attachments on telephone company-owned poles. The Commission considers, however, that use of and costs for telephone company support structures are not necessarily an appropriate basis for deriving costs for use by a cable or telecommunications company of electrical utility poles. Further, the CCTA has not provided any information regarding loss of productivity pertaining to municipal utility operations. The Commission considers that the MEA's loss of productivity cost of $3.15 is a reasonable estimate.

193. The Commission notes that the CCTA stated that administration costs specifically applicable to the placement of facilities on the MEA members' poles should also be seen as incremental costs appropriately recoverable through monthly pole rates.

194. However, the Commission notes that the MEA did not identify such pole-related administration costs. The MEA has taken a different approach to estimating the administration costs and has not included an incremental cost specific to pole-only related administration costs. Absent any specific evidence as to what would constitute a reasonable incremental cost for pole-related administration costs, the Commission has derived a $0.62 figure based on the MEA's submission, as discussed further in the following section.

195. Based on the foregoing, the Commission considers a figure of $3.77 per pole per year (that is, $3.15 in loss of productivity and $0.62 in incremental administration costs) to be a reasonable estimate to recover ongoing incremental costs.

3. Capital Costs

196. Based on an estimate of embedded costs obtained by deflating a $1,270 replacement pole cost using the Consumer Price Index (CPI) over a 25-year period, and assuming an even distribution of poles, the MEA derives an average embedded cost of $820, a net embedded cost of $520 and an annual depreciation expense of $32.80.

197. The CCTA submitted that the MEA's embedded and net embedded cost estimates are too high. The CCTA added that, as acknowledged by the MEA, these figures are not based on historical data but are estimates derived from an initial cost which is itself an estimate. The CCTA considered that no attempt had been made by the MEA to exclude the pole cost elements which are purely for the benefit of the power utilities (e.g. the cost of cross arms) or to accommodate the fact that power utility poles are more expensive to purchase

and install than poles which would be installed purely for communications purposes. The CCTA also considered that, in the present circumstances, the simplest way to achieve an estimate would be to adopt the costs of the telephone companies.

198. In reply, the MEA submitted that the accounting practices of the Respondents are not set up in such a manner that all utilities can supply exact pole costing figures. However, the MEA stated that its estimates are based on real data supplied by utilities in question and are not based on five-year-old information obtained from a completely different industry, as is the case with the CCTA's data. The MEA submitted, moreover, that the reasonableness of its data is confirmed by the actual data of Milton Hydro. The MEA also submitted that the Milton Hydro analyses are within 5% to 8% of the estimates developed by the MEA and validate the reasonableness of the MEA's estimates.

199. The MEA noted that it agreed with the CCTA claims that items such as cross arms should be excluded from the capital costs of power utility poles and added that it had removed such costs from the figures it proposed. The MEA further added that any cost-based model should be grounded on the costs inherent in the poles in question, i.e., power utility poles.

200. In its evidence, the MEA included a 10% Return on Asset Base which is applied against the net embedded cost of a pole. The CCTA submitted that the inclusion of a 7% rate would be a more appropriate estimate of the actual annual carrying charge because the power utilities are municipally controlled entities which can finance debt at less than a 10% rate. In reply, the MEA submitted that the 10% figure represents the return required by its members for their assets and does not reflect debt, carrying costs or financing charges.

201. The MEA also included a 10% administration mark-up on the Depreciation expense and Return on Asset base. In interrogatory MEA(CCTA) 24Oct97-9, the MEA indicated that this Administration mark-up is intended to recover additional power utility costs such as a Commissioner's expense, a general administration expense and office maintenance which are not reflected in the capital cost of the pole.

202. In this regard, the CCTA submitted that these types of costs should not be included when determining the contribution to capital costs payable by the cable companies. The CCTA submitted that the pole rate should recover the ongoing incremental costs associated with cable company use of a power utility pole, as well as make a reasonable contribution to the capital cost of the pole, but is not intended to make a contribution to the general operating costs of a power utility.

203. In its evidence, the MEA also included a $20 annual pole maintenance cost in its calculation of annual capital carrying costs. According to the MEA, this maintenance cost includes $15 for tree trimming, $3.50 for pole testing and maintenance and $1.50 for pole straightening.

204. The CCTA noted that, in interrogatory MEA (CCTA)24Oct 97-6(b), the MEA indicated that the $15 tree trimming cost includes the cost of trimming at the communications space level where this task is performed by the power utility on joint use poles. The CCTA added that at the same time, under past MEA support structure agreements, as well as under the MEA's proposed new model agreement, the cable companies would be required to pay a separate charge for all tree trimming at the communications space level,

independent of the monthly pole rate. The CCTA stated that the MEA's maintenance cost should be adjusted downward to bring it into line with the maintenance costs of the telephone companies which, according to the CCTA, range between $5.75 to $15.00.

205. The Commission agrees with the MEA that any cost based model should be established based on the costs of power utility poles rather than poles designed merely for communications purposes, and that the cable companies should pay for the use of the poles available to them.

206. The Commission notes that the MEA members are not subject to any regulatory accounting requirements to maintain separate sub-accounts for support structures and, as a consequence, the accounting costs for poles alone are not available. However, the Commission also notes that the MEA, to support its estimates of embedded and net embedded costs of a pole, submitted an analysis of Milton Hydro poles which was appended to the MEA's 17 October 1997 evidence.

207. Using an embedded cost of service approach based on utility financial records, Milton Hydro developed a methodology for determining the full costs associated with utility overhead lines and the pole component for those lines. From Appendix A of the Milton Hydro analysis the following figures for poles are available: the net embedded cost of a pole is $478 and the annual depreciation expense is $31.11.

208. The Commission notes that, unlike the estimates submitted by the MEA, the evidence from Milton Hydro is based on financial records to determine pole costs. In the absence of actual data for the MEA-wide pole population in question, the Commission is of the view that the Milton Hydro data could serve as a reasonable proxy. Therefore, the Commission determines that the estimated net embedded cost of $478 and depreciation expense of $31.11 are to be used in the calculation of the pole rental rate.

209. The Commission considers that the pole rate is not intended to make a contribution to the general operating costs of a power utility. In the absence of identification by the MEA of any pole-specific administration-related incremental costs directly related to the use of power utility poles by the cable companies, the Commission considers that one half of the MEA's total administration mark-up, amounting to $0.62 annually, will serve as a reasonable estimate for ongoing incremental pole-related administration costs such as the costs of issuing permits, administering contracts and, billing and collections.

210. With regard to the MEA's proposed return on investment rate of 10%, the Commission notes that in the MEA's 14 April 1997 evidence in support of its rental rate, it described its proposed 8% Annual Carrying Charge as the annual lost investment opportunity represented by the installed cost of a 40 foot wood pole. The MEA also stated that its proposed 8% return on investment is consistent with financial planning practices at investment, insurance and pension organizations. In the same submission, the MEA also added that the rate of return presently allowed municipal utilities by Ontario Hydro is 8.5%.

211. The Commission agrees with the MEA that the owners of power utility pole assets should be allowed to recover a return on their investment. However, the Commission considers that the proposed 10% return is not supported by the MEA's evidence in this matter. In light of the above, the Commission determines that 8.5% is appropriate as a return on investment rate.

212. The Commission considers that maintenance costs should exclude tree trimming. Rather, the power utilities should be permitted to levy a separate charge on cable companies to reflect tree trimming activities. The Commission considers that this matter is best left to be resolved by the parties in the first instance. Furthermore, the Commission notes that in the Milton Hydro study, pole maintenance costs, excluding tree trimming, are $6.47 ($5.00 for pole testing and $1.47 for straightening). Consistent with the Commission's determination that the Milton Hydro data should be used in the rate calculation, maintenance costs of $6.47 will be included in the monthly pole rental rate.

4. Space Allocation Factor

213. The CCTA submitted that a factor based on the percentage of usable space consumed remains the most appropriate means of allocating capital costs. The CCTA also submitted that under this approach, an allocation factor of 7.4% would be appropriate since the cable companies use 1 foot out of a total 13.5 feet of usable space on a typical 40 foot pole. The MEA has proposed two different allocation factors - (i) the Pole Space Model factor and (ii) the MEA's Glaeser Model factor.

(i) Pole Space Model

214. A basic 40 foot joint use pole is described in the MEA's evidence as follows:

Power space	11.50 ft
Separation space	3.25 ft
Communication space	2.00 ft
Clearance	17.25 ft
Buried	6.00 ft

215. The MEA Pole Space Model allocation factor is 33% and is obtained by averaging the allocation factors of 26% and 40% which, in turn, are based on allocations between three users (cable company, telephone company and power company) and two users (cable company and power company), respectively. The MEA proposed to allocate the total length of a 40 foot pole such that the user or users of the communications space are responsible for 100% of the communications space, 100% of the separation space, and a proportionate share (i.e., 50% or 33% depending on the number of users, as the case may be) of the clearance and buried portion of the pole.

216. The CCTA submitted that the allocation of the separation space to a cable company is not justifiable. The CCTA added that the need for a separation space is caused by the obligation of the power utilities to comply with Canadian Standards Association (CSA) standards, which in turn, are intended to address the dangerous nature of the power utilities facilities. The CCTA does not agree that the cost of clearance space and buried pole should be shared equally among all support structure users. The CCTA also submitted that the allocation factor should reflect the benefits and superior rights

associated with pole ownership such that the owner should bear a correspondingly higher share of the capital costs. In the CCTA's view, the communications space is spare capacity to the power utilities, and they would be fully compensated for the use of this space if they recovered any incremental costs which they may incur.

217. In reply, the MEA submitted that the separation space is necessary only because of the placement of cable company plant on power utility poles. The MEA added that without communications attachments a power utility could, in many circumstances, install shorter poles or use the entire communications and separation space itself. The MEA suggested that the separation space only exists to protect the communications plant and workers and the electric power utilities derive no benefit.

(ii) Glaeser Model

218. Under the Glaeser Model approach, capital costs are allocated on the basis of the benefits, measured by the avoided costs to each party realized through joint use poles, i.e., the capital cost of a pole is allocated according to the relative cost a cable company would otherwise have to incur. Depending on the number of users, the Glaeser Model uses the formula C/(C+U) or C/(C+C+U) to determine the allocation factor for a cable company. In these formulas, C is the cost of a communications pole and U is the cost of a power utility pole. By averaging the allocation factors which result from these two formulas, the MEA arrives at a Glaeser Model allocation factor of 35%.

219. In its final comments, the CCTA submitted that the Glaeser Model fails to adequately take into account the fact that the power utilities use a higher cost pole. The CCTA added that the Glaeser Model has never been used to set support structure rates and in its view, it would be inappropriate for the Commission to use this methodology now. The CCTA added that this model purports to allocate costs according to relative benefit, however, it fails to take into account the benefits of ownership.

220. In reply, the MEA submitted that the Commission should not be dissuaded from adopting a methodology only because it has never used the model on prior occasions.

221. The costing approach used by the MEA in developing its proposed $40.53 annual rate is based on a fully distributed costing methodology which requires the communications companies to bear the full costs of the communications space, a share of clearance and buried pole and all of the separation space costs.

222. The Commission is of the view that in determining the appropriate costs to be recovered from the cable companies, it is important to consider that they do not have the rights of ownership of the pole. Accordingly, the Commission considers that the fully distributed costing approach proposed by the MEA is not appropriate and that an allocation factor based on the percentage of usable space consumed is more reflective of a user's actual use and therefore is a more appropriate means of allocating costs. Furthermore, in light of increasing competition in broadcasting distribution and telecommunications and the potential for future growth in the number of communications space users, the Commission is of the view that the expectation that all power utility poles will accommodate two communications users is reasonable.

223. The Commission considers that the usable space on a 40 foot power utility pole, after allowance for clearance and buried pole, is 16.75 feet. Moreover, the Commission is of the view that the power utilities derive no benefits from the separation space, and that the separation space is necessary only to protect the employees and attachments of the communications companies. The Commission agrees with the MEA's comments that, without communications attachments, the power utilities could use the entire separation and communications space itself. Therefore, the Commission considers that the separation space is causal to communications users. Accordingly, the separation space, as well as the communications space, will be allocated equally between two communications users.

224. Based on the above, the Commission considers that the cable companies occupy one foot of the communications space and 1.6 feet of the separation space for a total of 2.6 feet of the 16.75 feet of usable space. Therefore, the Commission determines that the resulting space allocation to cable companies is 15.5%.

225. Based on the findings in this decision, the Commission calculates the pole rental rate as follows:

Net embedded cost/pole:	$ 478.00
Depreciation:	31.11
Interest: *(8.5% of Net embedded cost/pole)*	40.63
Maintenance:	6.47
Administration mark-up:	N/A
Total capital related costs: *(Depreciation + Interest + Maintenance)*	78.21
Cable distribution allocation: *(Space Allocation Factor)*	15.5%
Contribution: *(Total capital related costs x Cable distribution allocation)*	12.12
Loss in productivity:	3.15
Administration costs:	0.62
Total annual cost/pole: *(Contribution + Loss in productivity + Administrations Costs)*	$ 15.89

226. The Commission hereby sets the annual pole rental rate at $15.89 per pole unless and until parties agree otherwise.

E. Non-Monetary Terms of the Support Structure Agreement

227. The CCTA submitted that the cable companies have been unable to reach an agreement with the power utilities on terms for renewal of the support structure agreements which expired on or before 31 December 1996. The CCTA added that the appropriate remedy at

this time would be for the Commission to set the pole rate and give the cable companies permission to access the power utilities' support structures on the same non-monetary terms as applied in 1996.

228. The MEA submitted in reply that, if the rate issue is resolved, only five issues of any significance need to be resolved. In the MEA's view, these can be resolved through negotiation by the parties and do not require Commission intervention. According to the MEA, the five issues to be resolved are: fees; signature of plans by a professional engineer; liability, damages and insurance; vested rights; and assignment.

229. The MEA added that, contrary to the CCTA's submissions, the expired pole attachment agreement is no longer viable. The MEA stated that the power utilities had a number of concerns with the expired 1992 Model Agreement related to issues and problems that were not addressed or were completely lacking in the expired agreement. The MEA listed a number of elements of the expired pole attachment agreement which would be problematic if the Commission attempted to impose the expired contract for future pole attachments. The MEA stated that these concerns relate directly to the safe, efficient and cost effective operation of the utility distribution system.

230. In reply, the CCTA stated that negotiations were promising, at least in respect of non-monetary terms. However, the CCTA added that they also believe that the completion of such negotiations would likely take several months while they require access to the poles of the Respondents' power utilities as soon as possible.

231. While the Commission is of the view that it has the jurisdiction to set the non-monetary terms and conditions of access to support structures, it considers that these matters are best left to negotiations between the parties. Given the MEA's suggestion that there are only a few issues outstanding, the Commission considers that a new negotiated pole attachment agreement is likely achievable. However, until such time as a new agreement is reached, the cable companies need access to the support structures of the power utilities. Therefore, the Commission directs that the cable companies be granted access on the same non-monetary terms as set out in the expired support structure agreement unless and until the parties agree otherwise.

F. Other Causal Costs Due to Cable Company Attachments on Power Utility Poles

232. In its evidence, the MEA submitted that, in addition to loss of productivity in carrying out utility line work around cable company attachments, there are a number of other causal costs incurred by the utility due to the presence of cable company attachments on utility poles. The MEA submitted that non-recurring direct charges to be recovered should be separate from the pole attachment cost.

233. The MEA submitted that these causal costs vary among utilities and cable companies according to factors such as local conditions, amount of ongoing work, and cable company performance. Examples of causal costs subject to direct charges include: extra engineering time required due to the presence of cable attachments on poles, review of permit applications, cost to make bonding connections to utility neutral conductor, and the cost of an initial field inspection to determine feasibility of proposed joint use.

234. In reply comments, the CCTA submitted that the cable companies have not experienced significant problems with the respondent power utilities in the past in respect of such non-recurring charges. The CCTA stated that, while it has not been a central concern in the present application, the cable companies believe that it is important to emphasize that the Commission would have jurisdiction under subsection 43(5) of the Act should an access dispute ever relate to such charges.

235. The Commission considers that it has the jurisdiction to intervene in any dispute relating to access to support structures including those relating to the recovery of non-recurring charges. The Commission considers that the recovery of other causal costs is best left to be negotiated between individual cable companies and power utilities in the first instance.

G. Pole Rental Rate of the PUCs not Represented by the MEA

236. The PUCs not represented by the MEA within the scope of this proceeding are: Toronto Hydro-Electric Commission, West Elgin Hydro-Electric Commission; CNP; Chatham Hydro; Deep River; L'Orignal HEC; Pelham HEC; Plantagenet HEC; and Webbwood HEC. Deep River and CNP each filed an answer on its own behalf.

237. The submissions of Deep River and CNP largely objected to the Commission intervening in this matter while offering little evidence to substantiate pole costs and the pole rental rate.

238. However, in its 7 March 1997 submission, CNP stated: "as Rogers believes that it can seek resolution by the CRTC on contractual matters, we feel justified in requesting that the CRTC impose a decision on Rogers to accept our last offer of a one year contract and a very reasonable pole rate of $20.75." However, no specific evidence on incremental or capital cost elements included in the pole rental rate was submitted by the power utility. Also, by letter dated 2 April 1997, CNP stated that it was prepared to await the outcome of the Commission process to determine a rate for the MEA. CNP also added that it would be further prepared to harmonize its pole rate with the MEA's mediated rate, provided it deemed it to be fair and equitable.

239. By letter dated 21 February 1997, Pelham HEC confirmed that it would renew its expired contract effective 1 January 1997. Pelham HEC also stated that "the pricing will be as agreed after negotiations with the MEA or a final ruling from the CRTC".

240. The Commission notes that none of the other respondent PUCs not represented by the MEA submitted pole costs or rate evidence in this proceeding on their own behalf. The Commission also notes that the PUCs were aware of the CCTA's application against them and had an opportunity to participate in the proceeding. Therefore, the Commission determines that the annual pole rental rate of $15.89 applies to all the Respondents in this application unless and until the parties agree otherwise.

Conclusion

241. The Commission determines that, unless and until the parties agree otherwise, the cable companies will be granted access on the same terms and conditions as set out in the individual expired support structure agreements, adjusted so that the annual pole rental rate, as of the date of this decision, is fixed at $15.89 per pole per year.

242. With respect to the Toronto Hydro-Electric Commission, the terms and conditions of past agreements that applied to the Hydro Electric Commission of the City of North York and the Public Utilities Commission of the City of Scarborough, with the exception of the pole rate which is fixed at $15.89 per pole per year would, unless and until the parties agree otherwise, continue to apply in their respective former territories. Similarly, with respect to the West Elgin Hydro Electric Commission, unless and until the parties agree otherwise, the cable companies will be granted access on the same terms and conditions as set out in the expired support structure agreement of the West Lorne Public Utilities Commission, adjusted so that the pole rate as of the date of this decision, is fixed at $15.89 per pole per year.

Secretary General

ENDNOTES

1. Transactions were authorized in Decision 97-157, 24 April 1997.

2. As of 1 January 1998, three of the utilities represented by the MEA were dissolved and reconstituted under provincial legislation. Pursuant to subsection 28(3) of the *City of Toronto Act, 1997*, S.O. 1997, c. 2, the Hydro Electric Commission of the City of North York and the Public Utilities Commission of the City of Scarborough were dissolved. A new hydroelectric power utility named the Toronto Hydro-Electric Commission was established pursuant to the above-noted Act. Similarly, the West Lorne Public Utilities Commission was dissolved by municipal by-law and ministerial order. A new utility was established under the name of West Elgin Hydro-Electric Commission. These reconstituted entities are not represented by the MEA.

3. Criteria for interim relief as set out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, as supplemented by *RJR MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311.

4. [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

5. Hogg, *Constitutional Law of Canada*, p. 15-33.

6. Telus provides an overview of the jurisprudence relating to the two approaches applied by the courts in determining whether a federal law may validly affect a provincial matter. According to Telus, the two approaches that have been applied in the jurisprudence are: 1) the rational, functional connection test enunciated in *Papp v. Papp* (1970), 1 O.R. 331 (Ont. C.A.) and applied in *R. v. Zelensky*, [1978] 2 S.C.R. 940 and in *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, and 2) the test as to whether the impugned provision is truly "necessary" or essential to the operation of the legislative scheme as enunciated as a dictum in *R. v. Thomas Fuller Construction*, [1980] 1 S.C.R. 695 and cited with approval in *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9. Telus notes that Professor Hogg observes that the stipulation that the impugned provision be "essential" to the legislative scheme is more strict than the rational connection test and notes that in *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641, Dickson J. attempted to reconcile these approaches such that "As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained" at p. 671. Telus submits that under this theory, a court must measure the degree of encroachment of a legislative scheme on the other government's sphere of power and then determine how necessary the impugned provision is to the otherwise valid legislative scheme. For minor encroachment, the rational functional test is appropriate. For major encroachment, a stricter test, such as the "truly necessary" or "essential" tests apply.

7. *Bell v. Canada* (Human Rights Commission), [1996] 3 S.C.R. 854.

8. As noted by Hogg in *Constitutional Law of Canada*, at pages 15-12 to 15-16 (1998, loose-leaf edition), the characterization of a law for constitutional purposes involves the identification of the "matter" of the law; the matter is often described as the "pith and substance" of the law, but is perhaps best described as the dominant or most important

characteristic of the law. The process of characterization is not a technical, formalistic exercise, confined to the strict legal operation of the impugned law. For example, the fact that a provincial law levies a tax is not decisive of its classification as a taxing measure. The Court will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve. In determining the purpose of a statute, Hogg states that there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law which the statute purports to correct.

9. *Radio Reference*, [1932] A.C. 304; *Re CFRB* (1973), 3 O.R. 819 (Ont. C.A.); *Capital Cities Communications v. CRTC*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191; *Attorney General (Quebec) v. Kellogg's Co.*, [1978] 2 S.C.R. 211; *Irwin Toy v. Attorney General (Quebec)*, [1989] 1 S.C.R. 927; and *Re Canadian Motion Pictures Distributors Association et al. and Partners of Viewer's Choice Canada* (1996), 68 C.P.R. (3d) 450 (F.C.A.).

10. Subsections 91(29) and 92(10)(a) of the *Constitution Act, 1867; Toronto v. Bell Telephone Co.*, [1905] A.C. 52; *Alberta Government Telephones v. CRTC*, [1989] 2 S.C.R. 225; *Téléphone Guèvremont Inc. v. Quebec (Régie des Télécommunications)*, [1994] 1 S.C.R. 878.

11. Re *Oshawa Cable TV Ltd and Town of Whitby* (1969), 4 D.L.R. (4th) 224 (Ont H.C.J.) regarding the constitutional incompetence of a province to regulate the construction and operation of a cable company's distribution network.

12. *Quebec (Commission du salaire minimum) v. Bell Telephone Co.*, [1966] S.C.R. 767.

13. *Munro v. National Capital Commission*, [1966] S.C.R. 663; *Dyke and Cochin Pipe Lines* (1978), 85 D.L.R. (3d) 607 (Sask. C.A.); *Re Canadian Motion Pictures Distributors Association et al. and Partners of Viewer's Choice Canada* (1996), 68 C.P.R. (3d) 450 (F.C.A.); *Canadian National Railway Co. v. National Transportation Agency*, [1996] 1 F.C. 355 (F.C.A.).

14. *Re Ontario Hydro et al.*, [1993] 3 S.C.R. 327.

15. *Toronto v. Bell Telephone Co.*, [1905] A.C. 52; *Toronto v. Canadian Pacific Railway Co.*, [1908] A.C. 540; *Canadian Pacific Railway Co. v. Toronto Transportation Commission*, [1930] A.C. 696, [1930] 4 D.L.R. 849 (P.C.); *Bell Telephone Company of Canada v. Canadian National Railway Co.*, [1933] A.C. 563; *Toronto Railway Company v. Toronto*, [1920] A.C. 426.

16. *Fulton v. Energy Resources Conservation Board*, [1981] 1 S.C.R. 153; section 92A of the *Constitution Act, 1867*.

17. Côté, P.-A., *The Interpretation of Legislation in Canada*, 2d ed., at pages 219-224.

18. *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536.

19. Dreidger on the Construction of Statutes, 3rd ed., at page 131.

20. Dreidger, *supra*, at page 427.

21. *Canadian Pacific Railway Co. v. Toronto Transportation Commission,* [1930] A.C. 696, [1930] 4 D.L.R. 849 (P.C.); *Bell Telephone Co. v. Canadian National Railway,* [1933] A.C. 563; *Canadian Electrical Association v. Canadian National Railway,* [1934] C.R.C. 162 (P.C.); *Canadian National Railway Co. v. Bell Telephone Co.*, [1939] S.C.R. 308; *Canadian Pacific Railway Co. v. Attorney-General (Quebec),* [1965] S.C.R. 602; *Toronto Railway Company v. Toronto,* [1920] A.C. 426.

22. *Convergence - Competition and Cooperation - Policy and Regulation Affecting Local Telephone and Cable Networks, Report of the Co-Chairs of the Local Networks Convergence Committee,* at page 63.

23. See, for instance, *Transvision (Magog) Inc. v. Bell Canada,* [1975] C.T.C. 463.

24. *Supra,* note 22, at page 65.

25. *Supra,* note 22, at page 66.

26. *Supra,* note 22, at page 67.

27. *Proceedings before the Standing Senate Committee on Transport and Communications,* Senate of Canada, Issue No. 27 (June 22, 1992), at 27:36.

28. Subsection 43(1) provides that in sections 43 and 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the *Broadcasting Act.*

29. *Bell Canada, Tariff for the Use of Support Structures by Cable Television Licensees,* Telecom Decision CRTC 77-6, dated 27 May 1977.

30. See, for example, *Review of Regulatory Framework,* Telecom Decision CRTC 94-19, dated 16 September 1994; *Competition and Culture on Canada's Information Highway: Managing the Realities of Transition,* 19 May 1995; *Implementation of Regulatory Framework - Co-location,* Telecom Public Notice CRTC 95-13, dated 20 March 1995; *Implementation of Regulatory Framework - Local Interconnection and Network Component Unbundling,* Telecom Public Notice CRTC 95-36, dated 11 July 1995; *Implementation of Regulatory Framework - Local Number Portability and Related Issues,* Telecom Public Notice CRTC 95-48, dated 10 November 1995; *Local Competition,* Telecom Decision CRTC 97-8, dated 1 May 1997; *Forbearance - Regulation of Toll Services Provided by Incumbent Telephone Companies,* Telecom Decision CRTC 97-19, dated 18 December 1997; *Stentor Resource Centre Inc. – Forbearance from Regulation of Interexchange Private Line Services,* Telecom Decision CRTC 97-20, 18 December 1997; *Implementation of Price Cap Regulation and Related Issues,* Telecom Decision CRTC 98-2, dated 5 March 1998; *Local Pay Telephone Competition,* Telecom Decision CRTC 98-8, dated 30 June 1998; *Regulation under the Telecommunications Act of Certain Telecommunications Services Offered by Broadcast Carriers,* Telecom Decision CRTC 98-9, dated 9 July 1998; *Review of Contribution Regime of Independent Telephone Companies in Ontario and Quebec,* Telecom Decision CRTC 99-5, dated 21 April 1999.

31. *New Regulatory Framework for Broadcasting Distribution Undertakings,* Public Notice CRTC 1997-25, dated 11 March 1997; *Broadcasting Distribution Regulations,* Public Notice CRTC 1997-150, 22 December 1997.

32. *British Columbia Telephone Company v. CRTC*, 28 June 1991, File No. 91-A-1800 and 91-A-1920 (F.C.A.), leave to appeal denied on interlocutory ruling of 16 May 1992, CRTC Exhibit No. 6, in the proceeding leading to Decision 92-12; cf. Section 336 of the former *Railway Act*.

33. The Commission notes that its jurisdiction to resolve access disputes under subsection 43(5) is to be contrasted with the Commission's ongoing regulation of access to supporting structures of telephone companies which has not been based on subsection 43(5) of the Act. In the proceeding leading up to Telecom Decision 95-13, it was argued that the Commission should not render a general decision with regard to access to telephone company support structures and that access to such structures should only be governed by the specific regime provided at subsection 43(5) of the Act. The Commission concluded that access to telephone company support structures is a "telecommunications service" within the meaning of the Act. Accordingly, the Commission rejected the argument that its jurisdiction with respect to such access is governed only by subsection 43(5). Rather, in prescribing the rates, terms and conditions set out in Decision 95-13, the Commission relied on the provisions of the Act generally applicable to telecommunications services, including sections 24, 25 and 27. This is the approach adopted by the Commission previously under the *Railway Act*, and which was approved by the Supreme Court of Canada in *British Columbia Telephone Company v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, at pages 760-766.

34. See s. 43(2), 43(3), 43(4), 44, 67(1)(a), and 76(2) of the Act.

35. In this regard, the Commission notes that in *Transvision (Magog) Inc. v. Bell Canada, supra*, the Canadian Transport Commission (CTC) concluded that telephone company poles ceased to be pure private property. The CTC stated that the use and enjoyment Bell had of its property was subject to certain limitations imposed by law in the public interest. It also stated that when one devotes one's property to a use in which the public has an interest, one, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest one has thus created.

36. *Fenn v. Peterborough (City)* (1979), 25 O.R. (2d) 399 (Ont. C.A.); affirmed by the Supreme Court of Canada in *Consumers Gas Co. et al v. Fenn et al*, [1981] 2 S.C.R. 613.

37. *In the Matter of an Application under Rule 14.05(3) by Sudbury Hydro-Electric Commission for an Interpretation of Subsection 50(3) and Subsection 50(5) of the Planning Act, R.S.O. 1990, c. P.13* (1996), 29 O.R. (3d) 23 (Gen. Div.)

ATTACHMENT A

LIST OF RESPONDENTS

1. Barrie Public Utilities Commission
2. Canadian Niagara Power
3. Chatham Hydro
4. Clarington Hydro Electric Commission
5. The Hydro Electric Commission of the Town of Deep River
6. The Police Village of Embrun Hydro System
7. Essex Public Utilities Commission
8. Guelph Hydro
9. Hydro-Electric Commission of Cambridge and North Dumfries
10. Innisfil Hydro
11. Hydro Electric Commission of Kitchener-Wilmot
12. L'Orignal Hydro Electric Commission
13. Leamington Public Utilities Commission
14. Markham Hydro Electric Commission
15. Mississauga Hydro Electric Commission
16. Niagara-on-the-Lake Hydro Electric Commission
17. The Hydro Electric Commission of North Bay
18. Oakville Hydro
19. Orillia Water, Light and Power
20. Pelham Hydro-Electric Commission
21. Perth Public Utilities Commission
22. Pickering Hydro
23. Plantagenet Hydro Electric Commission
24. Public Utilities Commission of the Village of Port Stanley
25. Public Utilities Commission of the Town of Paris
26. Richmond Hill Hydro Electric Commission
27. Shelburne Hydro
28. Stoney Creek Hydro-Electric Commission
29. Stratford Public Utility Commission
30. Toronto Hydro-Electric Commission (formerly Hydro Electric Commission of the City of North York and the Public Utilities Commission of the City of Scarborough)
31. Hydro Electric Commission of Waterloo, Wellesley, and Woolwich
32. Webbwood Hydro Electric Commission
33. West Elgin Hydro-Electric Commission (formerly West Lorne Public Utilities Commission)
34. The Public Utilities Commission of the Township of Zorra

Attachment 4
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF a Motion by New Brunswick Power Distribution and Customer Service Corporation for an Order with Respect to Certain Studies and Information Requests Previously Ordered by the Board of Commissioners of Public Utilities

Board Reference: 2007-005

Pole attachments

Report to the Board

30 September, 2008

Énergie NB Power

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF a Motion by New Brunswick Power Distribution and Customer Service Corporation for an Order with Respect to Certain Studies and Information Requests Previously Ordered by the Board of Commissioners of Public Utilities

Board Reference: 2007-005

Pole Attachments – Report to the Board

TABLE OF CONTENTS

Introduction

Executive Summary

Overview

Maintenance of Inputs

Appendices

INTRODUCTION

In May, 2007 a Motions day was held with the Energy and Utilities Board (EUB) with respect to certain studies and information requests previously ordered by the Board of Commissioners of Public Utilities (PUB). The previous order by the PUB read as follows:

> "The Board directs Disco to undertake a study into its poles, equipment and related costs that will be used to review attachment rates at a future hearing. Disco is instructed to consult with Board staff, Rogers and the Municipals to determine the scope of the study."

In its Decision of May 31, 2007, the EUB stated that it continued to believe a study of poles and related costs (page 20 of the Decision) was important and varied the previous directive to require Disco to complete the study by April 30, 2008. An extension of this date was granted by EUB staff on the basis that discussions were on-going and issues were being resolved between interested Parties.

In response to this directive, Disco scheduled meetings to consult with Parties on this matter. Invited Parties included;

- Rogers Communications Inc.
- Saint John Energy
- Edmundston Energy
- Perth-Andover Light Commission
- E-novations
- Eastlink Cable systems
- Group Telecom Networks
- Telus Communications Inc.
- Internetworking Atlantic Inc.
- MTS Allstream Inc.

EXECUTIVE SUMMARY

The scope of the study was established to address two significant areas of disagreement between the parties; embedded cost and loss of productivity. Embedded cost resolution requires agreement on the number of poles owned by NB Power and the method to remove power specific costs. Loss in productivity resolution requires agreement on the various components as outlined in (3) below.

The parties have agreed to the following:

1. **Number of NB Power Owned Poles in the Province**
   The quantity of poles owned by NB Power is determined collaboratively through information provided from NB Power's Geographical Information System (GIS) and Bell Aliant's CableCad system. The number of poles owned by NB Power as of December 31, 2007 was 315,315.

2. **Settlement on the methodology to be used in determining cost for power specific components**
   The accepted method to remove the cost of power specific components from the embedded pole cost is to remove 15% from the installed cost of poles and fixtures combined.

3. **Agreement on the inputs and method to calculate loss in productivity**
   Loss in productivity is based on NB Power response to call-outs that are communication facility issues and the time lost while performing work on NB Power owned poles with communication attachments present.

   The number of call-outs to communication issues is captured in NB Power's Outage Management System (OMS). In fiscal year 2007, NB Power responded to 2,001 incidents that were communication issues. It has been agreed 76% of these call-outs occur after hours, 24% occur during normal working hours.

   The number of NB Power owned poles worked on are captured in NB Power's Maintenance Management Systems and Planned Capital Improvement programs. In Fiscal year 2007 NB Power personnel worked on 19,319 poles. It has been agreed that communication attachments cause power personnel to lose 12 minutes per pole worked on.

In addition to the above, as per the 2005/06 Disco rate hearing evidence and transcripts, the parties have previously agreed on the following:

4. **Depreciation cost** at 3.125% per year
5. **Capital carrying cost** of 9.9%
6. **Utility tax** of 2.25%
7. **Maintenance Cost**
   a. Yearly pole and anchor maintenance based on historical expenditures and spread across all NB Power owned poles.
   b. Yearly vegetation costs based on historical expenditures and spread across all poles.
8. **Administration costs** of $0.55 per pole

OVERVIEW

The first meeting with Board Staff and interested parties was held on February 21, 2008. At this meeting, the scope of the study was agreed and defined to address three key components:

1) Number of poles NB Power owns
2) Methodology to remove the cost of power specific components
3) Loss in Productivity

There are seven cost component inputs required to establish pole attachment fees:

1) Embedded cost
2) Depreciation cost
3) Capital carrying cost
4) Utility tax
5) Maintenance cost
    a. Pole and anchor maintenance
    b. Vegetation maintenance
6) Loss in productivity
7) Administration cost

At the 2005/06 Disco rate hearing, Rogers and NB Power agreed on all components except embedded cost and loss in productivity. The scope of the study is designed to address both of these components.

A second meeting with Board Staff and other interested parties was held on March 17, 2008. At this meeting, the first two items of the study were agreed upon as follows:

- Through the use of NB Power's Geographical Information System (GIS) and Aliant's CableCad system, the number of NB Power owned poles was established to be 315,315 as of December 31 2007. (please refer to Appendix A)

- The appropriate methodology to remove the cost of power specific components was determined. The method of removing 15% of the installed cost of poles and fixtures was accepted by NB Power and by Rogers pending confirmation from Rogers' Executive. Confirmation of agreement was received from Rogers on April 30, 2008. (please refer to Appendix B)

On April 7, May 26, and July 2, meetings were held between Rogers and NB Power to specifically work through the Loss in Productivity item. The concept and details around the determination of Loss in Productivity were finalized and agreed by both parties. (please refer to Appendix C)

The record of discussion from the February 21 and March 17, 2008 meetings can be found in Appendix D.

The final meeting between Board Staff and interested parties took place on August 21, 2008. At this meeting, the results of the study were presented and agreement was confirmed. EUB staff recommended that Disco file a report outlining the details of meetings and discussions held with interested Parties, the agreements and settlements made, and the rationale on how these agreements and settlements were made. In addition, it would be of benefit to outline how those inputs would be kept up to date and on-going to assist in whether rates need to be adjusted in the future.

The report would comply with the Board's directive from the June 2006 Decision and further repeated in the May 31, 2007 Decision, that Disco "undertake a study into its poles, equipment and related costs that will be used to review attachment rates at a future hearing. Disco is instructed to consult with Board staff, Rogers and the Municipals to determine the scope of the study".

Disco indicated that this report will be filed with the Board by September 30, 2008. Rogers requested an opportunity to view the report one week prior to the filing. In addition, Disco and Rogers have committed to continue discussions with respect to typical pole model for the province of New Brunswick.

MAINTENANCE OF INPUTS

NB Power Pole Quantities

Both collaborative systems to determine pole quantities are respectively NB Power's and Aliant's day to day operational systems. It is critical these systems are maintained to a high degree of accuracy. These systems can be queried at any point in time to assess the quantity of poles owned by NB Power.

Methodology to remove power specific costs

The straight forward method of removing 15% of the total installed cost of poles and fixtures is readily maintained as the only information required is NB Power's financial records with respect to these costs. These records are consistently maintained and can be queried at any point in time.

Embedded cost

The two items identified above are the inputs to determining embedded cost. Therefore, the embedded cost component can be easily reviewed at any point in time.

Loss in Productivity

There are two key data inputs required to determine loss in productivity:

1) The number of incidents NB Power responds to each year that are communication issues. These are non-outage incidents and are captured in NB Power's Outage Management System (OMS). An appropriate percentage of these that are attributable to communication facilities have been agreed upon. Therefore, maintenance of this component is achieved through accessing the information from OMS.
2) The number of poles that NB Power works on each year. This information is available each year from a combination of NB Power's Maintenance Management Systems and Planned Capital Improvement programs. This information is available for review on an annual basis.

Resource costs are based on NB Power's labour agreement and Crown Construction vehicle charge out rates. This information is readily available as it changes from year to year.

The remaining inputs to the loss in productivity component are the crew time to be applied to call outs that turn out to be communication issues and the quantity of time lost while working on poles with communication attachments. Both of these remaining items have been negotiated between the parties based on practical knowledge of the work.

APPENDIX A

NB Power Pole Quantities

NB Power's Geographical Information System (GIS) is a critical operating system and is maintained to be an accurate representation of the system. It is integrated with our Outage Management System. It is the electronic representation of NB Power's field assets. It is used on a daily basis to manage outages, switching, determining protection points, and issuing permits to perform work on the system. In order to ensure this model remains accurate, it is also integrated with NB Power's Electronic Line Design package utilized by field engineering to design new additions to the system as well as changes to existing facilities.

Aliant utilizes their CableCad application as an operational system to keep track of their assets. It is the system they design against and issue work permits. It has also been the means for several years to track specific joint use pole ownership in order to ensure the 57/43 ownership ratio is maintained.

Due to the nature and use of these systems, they are clearly the most accurate representation of installed assets.

System	Total Poles
NB Power Geographical Information System	554,974
Aliant CableCad	547,711

The 7,263 discrepancy between the two systems represents a difference of 1.3% and would be due to additional non-joint use poles owned by NB Power, such as customer dusk to dawn lights mounted on poles by themselves.

Owner	Joint Use	Non-Joint Use	Total
NB Power	297,942	10,110	308,052
Aliant	227,821	11,838	239,659
Total	525,763	21,948	547,711

Based on the above data, the best information available provides that as of December 31, 2007, NB Power has 297,942 joint use poles and 17,373 (10,110 + 7,263) non-joint use poles for a total of 315,315 poles.

APPENDIX B

Methodology to Remove Power Specific Costs

The following results are based on NB Power financial data to the end of fiscal year 2005 (i.e. March 31, 2005).

1. The first method was actually provided to NB Power by Rogers and can be seen as the means to remove power specific costs in their evidence submitted September 6, 2005. The very beneficial thing about this method is it is straight forward to apply. It simply involves removing 15% of the total installed cost of poles (poles and fixtures combined) in order to remove costs associated with power specific items such as cross-arms and insulators.

   Based on NB Power's financial data this method produces the following:

Net Embedded Cost	Average Embedded Cost
$401.54	$687.95

2. NB Power set out to develop an alternative method to determine the power specific component. This method is described in the attached document entitled "NB Power Power-Specific Component Assessment". Although on the surface it appears quite complex, in fact it is a quite straight forward and comprehensive approach. Basically, using design software to determine the cost of a bare pole and the cost of a power framed pole, and using these values to determine the value of the power specific components. Rogers correctly pointed out that the result was not applied in a mathematically precise manner. However, as provided in NB Power evidence, the application of the power specific factor was applied in a matter that was conservative in Rogers favour. Basically, the ***value*** of the factor was determined to be 27.5% of the installed pole cost account. Inadvertently, NB Power applied the 27.5% directly to the fixture cost account. This produced a conservative result because the fixture costs are actually greater than the pole costs. When the factor is applied in the mathematically precise manner, as expected it yields a slightly higher result as shown below:

Application	Net Embedded Cost	Average Embedded Cost
Approach used at PUB	$396.60	$681.00
Mathematically precise	$418.06	$714.69

3. Rogers attempted to use NB Power evidence data to generate yet another approach. The approach is sound; unfortunately Rogers didn't ask for the data required to apply this method and produced an inaccurate result. Basically, Rogers asked for a listing of the fixtures, the current unit price Disco pays for each, and to specify whether each item is considered power specific or not. The data this question did not seek, and that is critical to apply the approach, is the **installed cost** of these fixtures. This is very important as the ratio of labour and vehicles to material for different items is significantly different. Particularly of importance is the fact considerably more time is involved in the installation of non-power specific items such as anchoring and guying, which is the majority of the cost in the fixture account. NB Power's design and estimating application reveals the ratio of material cost to labour and vehicle cost for these components is about 3 to 1. Whereas the ratio of material to labour and vehicle for power specific items, such as insulators, is in the order of 1 to 1. In general, Rogers simply looked at only one piece of the puzzle. That piece indicated 45.4% of the total fixture cost was power specific. That is not the case at all. NB Power does not capture the total installed cost on an item by item basis. However, NB Power can apply the ratios shown above to determine the power specific items are 27.8% of the total fixture account and results in the following:

Net Embedded Cost	Average Embedded Cost
$395.71	$679.50

It should be noted, at the time of this exercise, the neutral was inadvertently considered to be power specific. However, the neutral is a requirement for the communications industry. CSA standards require communications facilities to be bonded to the neutral at a minimum every 300 meters. Treating this as non-power specific and applying the method above results in a factor of 25% of the fixture cost to be removed. This produces the following:

Net Embedded Cost	Average Embedded Cost
$403.25	$692.24

4. In addition, Rogers attempted to critic NB Power's methodology described in item 2 above and adjust for what they believed to be deficiencies. Unfortunately, misinterpretation of the information resulted in an erroneous result. This is evidenced at the beginning of Donald Ford's assessment where he expected the pole quantities from two different tables should be the same. They are not the same as one shows a 9 year history of pole usage by height and class whereas the other shows quantities of poles for those same years that are still in service, i.e. net of those installed and those retired. Both of these tables are clearly labelled as to what they represent. As a result Mr. Ford's conclusion that there is inconsistency in the pole height distribution data used is entirely incorrect.

The example Mr. Ford puts forward to demonstrate his point with respect to weighting is designed to produce his desired result and has no foundation in practical application. That is, his example assumes a 40 foot bare pole costs $300. That same pole with single phase construction costs $400, an increment of $100. He then goes on to indicate a 50 foot bare pole costs $500 and that same pole with single phase construction costs $800, an increment of $300. The problem with this is the incremental portion would be the same for either a 40 foot or a 50 foot for the same construction. This erroneous assumption considerably distorts his result.

Mr. Ford's most significant error is his assumption that NB Power bare pole design includes all non-power specific components such as joint use anchoring and guying. That is not the case. NB Power believes Mr Ford's method is another valid approach. However, one must include the value of the non-power specific components in the designs. Applying what Mr. Ford was attempting to do results in the following:

Net Embedded Cost	Average Embedded Cost
$419.40	$719.52

In summary, all of these approaches produce similar results. In fact they are all in a range of -1.45% to +4.6% with respect to the "15%" method originally recommended by Rogers and that is widely used throughout North America.

Conclusion

It is NB Power's position that Rogers and NB Power should adopt the method of removing 15% from the total installed pole cost to remove costs associated with power specific items. We base this position on the fact it is widely used today, is straight forward to apply, and has essentially been verified as appropriate through at least three alternative approaches.

Attachment to Appendix B

NB Power Power-Specific Component Assessment

Power construction has a number of different types and variations. Each of these have different material requirements and installation costs. Therefore to comprehensively identify the impact of power specific components, it is important to determine the frequency of construction types used and the percentages applicable to those construction types:

1) Determine frequency of construction types used:
   a) Historical records from Electronic Line Design "StakeOut" software provide the actual breakdown of what has been designed.
   b) This information was re-confirmed by a Geographical Information System query.

2) Determine percentage of variations on construction types (single pin, double pin, etc):
   a) Actual historical records from Electronic Line Design package.

3) Determine percentage of poles with both primary and secondary
   a) Actual historical records from Electronic Line Design package (1,897 units of mainline secondary versus 4,852 mainline poles = 39%).

   b) Confirmed via Geographical Information System query along with asset records (19,421 km of primary versus 7,389 km of secondary = 38%).

4) Percentage use of various pole heights:
   a) Actual historical records from Electronic Line Design package.
   b) Confirmed via 9 years of actual usage based on materials management system.

5) Prepare "bare" pole designs using Electronic Line Design package:
   a) 30 ft pole
   b) 35 ft pole
   c) 40 ft pole
   d) 45 ft pole
   e) 50 ft pole

6) Prepare power only designs using Electronic Line Design package:
   a) Stub poles

   b) Service poles

   c) Single phase construction
      i. Single pin construction
      ii. Double pin construction
      iii. Dead end construction

d) Three phase construction (power only anchor every 5 poles).
    i. Standard construction
        i. Single pin construction
        ii. Double pin construction
        iii. Dead end construction
    ii. Compact construction
        i. Single pin construction
        ii. Double pin construction
        iii. Dead end construction
    iii. Vertical construction
        i. Single pin construction
        ii. Double pin construction
        iii. Dead end construction

7) Percentages were derived from the information in (1) (2) and (3) above.

Disco calculated the percentage difference by subtracting the bare pole cost from the power frame pole cost for each of the various power construction types utilizing Disco's standard engineering units which provide material and labor to install. These percentages were then weighted based on the frequency of application of the particular construction type to determine the appropriate percentage to be removed to account for the power only components.

APPENDIX C

LOSS in PRODUCTIVITY ASSESSMENT

Tony O'Hara on behalf of NB Power and Clinton Lawrence on behalf of Rogers have concluded discussions on the components related to NB Power's loss in productivity due to the presence of communication attachments. Agreement has been reached as follows:

Concept

There are two components that make up the total loss in productivity. Part One being response to call-outs that end up being communication facilities issues. Part Two being the time lost while climbing and or otherwise manoeuvring around communication attachments while carrying out work.

Part One Lost Productivity Costs

NB Power responds to a number of non-outage wires down and tree on the line incidents over the run of a year as documented in their Outage Management System. Agreement has been reached with respect to the percentage of those incidents that are communication related as follows:

Incident Description	Total 2007	Comm. %	Comm. #
Wires down pole to house lights on	320	100%	320
Wires low pole to house lights on	613	50%	307
Tree on the line pole to house lights on	808	50%	404
Wires down pole to pole lights on (note 1)	485	50%	243
Wires low pole to pole lights on	291	75%	218
Wires low crossing the road lights on	139	50%	70
Tree on line pole to pole lights on	877	50%	439
TOTAL INCIDENTS	**3533**		**2001**

Note 1: We opted to use 50% here to give Rogers some relief as it appears a majority of these would be attributable to Aliant cable.

There was also agreement to use 2.0 crew hours as the appropriate time for response to these incidents. Further it was agreed that 76% of these incidents would occur after hours and would be charged out at double time; the remaining 24% would occur during regular hours and would be charged out at single time. Some discussion around Rogers' benefit of the NB Power on call roster but no cost sharing arrangement put forward at this time.

The formula to calculate NB Powers total "Part One" Lost Productivity Costs due to ALL communications attachments is as follows:

(24% * 2.0 hr. * Hourly Crew Rate * 2,001 incidents) PLUS
(76% * 2.0 hr. * OT Crew Rate * 2,001 incidents)

While the parties reached an agreement on the method and inputs to determine Loss in Productivity, they have not yet reached an agreement on how the result should be incorporated into the pole rate.

Part Two Lost Productivity Costs

Each year NB Power resources work on a number of poles. This component is intended to capture the inefficiencies associated with climbing over or around mainline facilities, tangent take-offs, service drops, additional down guys, and power supplies.

In addition there is impeded access for bucket work, raising and lowering equipment, tools, and materials. There is also the need to return to new construction jobs after communications has installed their facilities in order to reset anchors and re-tension power guys as required.

Agreement has been reached on the number of NB Power owned poles that NB Power works on each year while maintaining existing facilities and equipment as well as adding new as follows:

Activity	Total Disco Poles Worked On
Pole installations (**Note 1**)	11,700
Hotspot Repair	684
Switch Maintenance	180
Recloser Maintenance	80
New Services off existing poles	570
Feeder Balancing	57
Replacing Cutouts, insulators, L/A	1,995
Reconductor or 1Ø to 3Ø conversion	900
Routine pole, anchor and guy maintenance	3,153
Total Disco Poles worked on	**19,319**

Note 1: Disco installs app 6,500 poles per year. 80% are pole replacements that require two poles be worked on. Therefore poles worked on here is (.8*6500*2) + (.2*6500) = 11,700

There was agreement that the total number of Disco poles is retrieved from NB Power's GIS system which showed 315,315 poles as of December 31, 2007.

There was agreement that an appropriate allocation of lost time due to the presence of communication facilities is 12 minutes (0.2 hours).

The formula to calculate NB Powers total "Part Two" Lost Productivity Costs due to ALL communications attachments is as follows:

19,319 poles * 0.2 hr * Hourly Crew Rate

While the parties reached an agreement on the method and inputs to determine Loss in Productivity, they have not yet reached an agreement on how the result should be incorporated into the pole rate.

APPENDIX D

MEETING

POLE ATTACHMENTS

Thursday, February 21, 2008
Wu Conference Centre
UNB Campus, Fredericton
Room 204

9:00 AM	Introduction	Darren Murphy
9:15 AM	Presentation on pole attachment issues	Tony O'Hara
9:30 AM	Proposed study parameters and scope	Tony O'Hara
10:00 AM	Discussion	All
12:00 PM	LUNCH	
1:30 PM	Wrap-up/Next Steps	Tony O'Hara

Participants:

- NB Power Distribution and Customer Service Corporation
- New Brunswick Energy and Utilities Board staff
- Rogers Inc.
- City of Edmundston
- Saint John Energy
- E-Novations

Énergie NB Power

Thursday, February 21, 2008
Meeting – Pole Attachments

List of Attendees

1. Ellen Desmond – EUB
2. John Lawton – EUB
3. Mark Boudreau – Rogers
4. Michael Piaskoski – Rogers
5. Christiane Vaillancourt - Rogers
6. Darin Lamont –Saint John Energy
7. Dana Young –Saint John Energy
8. Michael Couturier – Edmundston Energy
9. Dan Dionne – Village of Perth Andover
10. Mike Richard – E-novations
11. Tony O'Hara – NB Power Distribution and Customer Service
12. Darren Murphy – NB Power Distribution and Customer Service
13. Lillian Gilbert – NB Power Regulatory Affairs

Record of Meeting

- Presentation by Tony O'Hara highlighted the cost components, items previously agreed, operational matters and progress made to date on pole attachments issues

COST COMPONENTS

- The cost components that have been agreed upon to date are several, and include;
  - depreciation cost
  - capital carrying cost
  - utility tax
  - maintenance cost
  - vegetation management
  - administration cost

- Three main issues remain unresolved;
  Two embedded cost related items:
  1. the number of poles being used in determining the cost
  2. method to remove costs associated with power specific components, and

  3. calculation of loss of productivity

1. The number of poles are derived from the following:
    - NB Power's GIS system
    - Aliant CableCAD system

    The difference in number of poles between the two systems is .19%. This is new collaborative information that provides a considerable amount of accuracy to determine an agreed upon number of poles.

    Rogers indicated they wished to attain information on the location of poles and pole ownership to keep numbers reconciled and limit disputes. Rogers can provide information from their GIS to overlay on other systems.

    Action: Tony O'Hara to provide information (spreadsheet from the Evidence provided in the 2005 Hearing) on the number of poles according to balance sheet, financials and depreciated value. This, along with new pole count information can provide the basis to determine average cost of poles.

2. There were four methodologies used to determine the removal of power specific components; the difference after running all four methodologies was 5%.

    Action: Tony O'Hara to provide information on the methodologies and calculations used on the power specific items. Tony will also provide an explanation of how Rogers applied the methodology differently resulting in misinterpretation of the data.

3. In considering loss in productivity, a number of operational factors must be taken into account:
    - Climbing (back lot, off road, inaccessible, etc.)
    - impeded bucket access
    - raising and lowering equipment and materials
    - returning to new construction sites
    - response to communication issues

    Action: Tony O'Hara to provide information for the unit of time used in this analysis (one hour per pole) and the explanation for the use of double-time charged for non-outage related calls.

    Darin Lamont of Saint John Energy offered to provide information on loss of productivity (amount of time lost by crews, not costing data).

    Information sharing will be used as a basis for the parties to understand the issues and the work involved around climbing poles.

Other Action Items:

Action: Tony O'Hara to provide information on the items agreed upon and their respective back-up (transcript reference, evidence).

Action: Tony O'Hara to lead on behalf of NB Power with appropriate contact at Rogers to work within the timeframe of now to April 30, 2008 to achieve the following;

- Information distributed amongst parties by the end of February, beginning of March
- 1st meeting in mid March
- 2nd meeting beginning of April
- If work is ongoing but cannot be complete by April 30, letter is to be sent to the EUB

Communication will be sent to all meeting participants to keep them informed and provide opportunity for comment.

Other

OPERATIONAL ISSUES

Service Poles

- No longer an issue as an agreement between Rogers and NB Power was reached in spring 2007 regarding consistent attachment fee for both mainline and service poles.

Sag

- Rogers has agreed to a measurement of one foot on initial construction for 60 meter spans.
- NB Power proposes to a further study of facilities sag under fully loaded conditions to determine the appropriate measurement
- There is a need to have a common understanding of sag issue

Action: Rogers agrees to forward sag and tension tables used for the installation of coax and fibre facilities.

Number of Rogers Attachments

- Concern was raised with respect to determining the correct number of NB Power poles Rogers is attached to.
- Based on 320,000 poles, in order to achieve a level of confidence of 99% and 2% margin of error, a sample size of 4,000 poles is required. A field audit near completion involves a sample size in excess of 20,000.

Action:

- Upon completion of the field audit, confirm the number of poles being used.
- Accordingly, bills to Rogers may be adjusted to reflect the agreed to quantities.

Attachment 5
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

DECISION

NSUARB - P-873
2002 NSUARB 1

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE PUBLIC UTILITIES ACT

- and -

IN THE MATTER OF AN APPLICATION by **NOVA SCOTIA POWER INCORPORATED** for Approval of an increase in its **Pole Attachment Charge**.

BEFORE: John A. Morash, C.A., Chair
Margaret A. M. Shears, Vice-chair
John L. Harris, Q.C., Member

APPLICANT: **NOVA SCOTIA POWER INCORPORATED**
Peter W. Gurnham, Q.C.

FORMAL INTERVENORS:

COMPETITION BUREAU
William J. Miller, LL.B.
Chuck Stevenson

EASTLINK LIMITED
Mark E. MacDonald, Q.C.

GASWORKS INSTALLATIONS INC.
John H. Reynolds, P.Eng.

HALIFAX REGIONAL MUNICIPALITY
Mary Ellen Donovan, LL.B.

SEASIDE CABLE TV (1984) LTD.
Robin Gogan, LL.B.

WITNESSES:

FOR THE APPLICANT
Christopher Huskilson, P.Eng.
Chief Operating Officer
Nova Scotia Power Inc.

Melvin Whalen, P.Eng.
Director of Regulatory Affairs and Rates
Nova Scotia Power Inc.

FOR THE COMPETITION BUREAU
Donald Ford
Telecommunications Consultant
D.A. Ford and Associates Ltd.

FOR EASTLINK LIMITED
John L. Bragg
Principal Owner, EastLink Limited

J. Lee Bragg
Co-CEO, EastLink Limited

Deborah Shaffner, C.M.A.
Chief Financial Officer

J. F. Fitzgerald, P.Eng.
Senior Director of Operations

Kenneth G. McBay, P.Eng
Director of Technical Planning

FOR SEASIDE CABLE TV (1984) LTD.
Anita Delazzer
General Manager, Seaside Communications

Craig Tweedy
President, First Communications Contractors Limited

OTHER PARTICIPANTS:	**STREATCH COMMUNICATIONS INC.** Steve Streatch **RuSh COMMUNICATIONS LTD** Mark Shannon **CROSS COUNTRY TV LIMITED** Steve Scott **NORTH NOVA CABLE** Dan MacDonald
LETTER OF COMMENT:	Robert G. Lewis, Sydney, NS Mayor John Prall Berwick Electric Commission Berwick
BOARD COUNSEL:	Richard J. Melanson
HEARING DATES:	April 23, 24 and 25, 2001
CLOSING SUBMISSIONS:	May 16, 2001
DECISION DATE:	**January 24, 2002**
DECISION:	**Application approved as revised by the Board.**

TABLE OF CONTENTS

INTRODUCTION 1

1.0 COMPONENTS OF POLE ATTACHMENT CHARGE - NET EMBEDDED COST AND DEPRECIATION COST 6
1.1 Submission - NSPI 6
1.2 Submission - Intervenors 7
1.3 Findings 8

2.0 DISPUTED CAPITAL COSTS 9
2.1 Interest 9
2.1.1 Submission - NSPI 9
2.1.2 Submission - Intervenors 11
2.1.3 Findings 12
2.2 Maintenance 13
2.2.1 Submission - NSPI 13
2.2.2 Submission - Intervenors 15
2.2.3 Findings 17

3.0 SPACE ALLOCATION FACTOR 17
3.1 Submission - NSPI 17
3.2 Submission - Intervenors 20
3.3 Findings 22

4.0 LOSS OF PRODUCTIVITY COST 24
4.1 Submission - NSPI 24
4.2 Submission - Intervenors 25
4.3 Findings 27

5.0 ADMINISTRATION COSTS 28
5.1 Submission - NSPI 28
5.2 Submission - Intervenors 29
5.3 Findings 31

6.0 AGGREGATION OF COSTS 32
6.1 Findings 32

7.0 OTHER ISSUES 34
7.1 Fairness of Access 34
7.1.1 Submission - NSPI 34
7.1.2 Submission - Intervenors 34
7.1.3 Findings 35
7.2 Capital Contribution 35
7.2.1 Submission - NSPI 35
7.2.2 Submission - Intervenors 38
7.2.3 Findings 38
7.3 Purchase of MTT Poles 39

8.0 CONCLUSIONS 40

Attachment

Schedule 'A'

INTRODUCTION

[1] This decision is further to a public hearing conducted by the Nova Scotia Utility and Review Board (the Board) from April 23, 2001 to April 25, 2001, in the matter of an application by Nova Scotia Power Inc. (NSPI) for approval of an increase in its Pole Attachment Charge. NSPI's application, which was filed on September 27, 2000, was heard under the authority of **s. 64** of the **Public Utilities Act**, R.S.N.S., 1989, c. 380, (the **Act**) which reads as follows:

> ***Approval of Schedule of Rates and Charges of Utility***
> ***64(1)*** *No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.*
>
> ***Filing with Board***
> ***(2)*** *The schedule of rates, tolls and charges so approved shall be filed with the Board and shall be the only lawful rates, tolls and charges of such public utility until altered, reduced or modified as provided in this Act. R.S., c. 380, s. 64.*

[2] Public notice of the hearing was provided by the Board and a number of Intervenors, both formal and informal, advised the Board of their concerns with respect to the application. Formal Intervenors in this application were the Competition Bureau, EastLink Limited (EastLink), Seaside Cable TV (1984) Ltd. (Seaside), GasWorks Installations Inc. (GasWorks) and Halifax Regional Municipality (HRM).

[3] NSPI is a regulated public utility and is the successor to the Nova Scotia Power Corporation, a crown corporation which was privatized in 1992. As of January 1, 1999, NSPI became the principal subsidiary of NS Power Holdings Incorporated, now know as Emera Incorporated.

[4] NSPI seeks Board approval for an increase in its annual pole attachment charge from $9.60 per pole to $17.22 per pole. The existing charge was approved by the Board pursuant to the hearing of a general rate application by NSPI (NSUARB-P-868) in 1996 and came into effect on March 1, 1996, as follows:

> *All pole attachments for telecommunication common carriers, or broadcasters, exclusive of those under joint use agreements - $9.60 per pole per year.*
> (NSUARB P-868, Decision, 1996)

[5] In addition to the recurring pole attachment charge, NSPI proposes to begin charging "telecommunication companies," which the Board takes to include MTT/Aliant, an "up-front" capital contribution to cover any additional capital costs required to accommodate their needs for space on new or replacement poles. Carriers subject to the capital contribution would also pay the on-going annual pole attachment charge.

[6] For purposes of this application, NSPI has largely adopted and applied the methodology prescribed by the CRTC in Decision 99-13, dated September 28, 1999. Excerpts from that decision were included as part of NSPI's pre-filed evidence [Exhibit P-1, Appendix D]. The Board notes that following the hearing the Board was advised that CRTC Decision 99-13 has been set aside by the Federal Court of Appeal on the basis that the CRTC lacks the jurisdiction to regulate access to structures owned by electric utilities.

[7] Mr. Donald Ford, of D. A. Ford and Associates Ltd., the expert witness called by the Competition Bureau, pointed out in his pre-filed evidence [Exhibit P-12] that since the CRTC first dealt with pole attachment rates in 1977, the CRTC has been consistent in its approach. It has held that the charge should recover all causally-related or incremental costs arising from the

use of space on the pole and in addition make a contribution to the annual fixed capital costs of the pole, based on the space used on the pole. Mr. Ford described the two cost elements as follows at p.3 of his pre-filed evidence:

> *Causally-related costs are those costs that are attributable directly to the presence of the user in the communications space on the pole and include costs for administration (such as contract preparation, permit issuance, inspection, billing and collection) and for loss of productivity (any additional costs incurred by the owner of the pole in carrying out its own construction or maintenance work due to the presence of the user in the communications space.)*
>
> *Annual fixed common costs of a pole include annual depreciation charges, annual capital carrying costs, annual maintenance costs and annual tree-trimming or brushing costs.*
>
> (Competition Bureau, Pre-filed evidence, Exhibit P-12, p.3)

[8] NSPI has followed the CRTC approach in developing its proposed rate in the present proceeding. It asserts, however, that a more appropriate charge would be $29.65 per pole per year based on a fully allocated cost approach. This figure results from an updated cost study attached as Appendix C to NSPI's pre-filed evidence. NSPI indicated at the hearing that in a future application for a revision of the pole attachment charge, it might propose that the costing methodology employed in Appendix C be approved by the Board. In the meantime, it agrees that an increase from $9.60 to $29.65 in one step would have a considerable impact on the communications companies.

[9] The Board does not consider that the relative merits of costing pole attachment service on the basis of incremental costs versus fully allocated costs were examined in sufficient depth at the hearing for it to make a definitive pronouncement on the matter at this time. The Board observes, however, that it was impressed with the common sense underlying Mr. Ford's

submission [Transcript p.292] that pole attachment service can hardly be characterized as a basic or core service provided by NSPI, and that an approach based on incremental costs plus a contribution to common costs is preferable where the customers receiving the service do not enjoy the advantages that an ownership interest in the poles would convey.

[10] The principal focus of the hearing was on whether NSPI correctly applied the methodology set out in CRTC Decision 99-13. The Intervenors challenged the amounts proposed by NSPI for many of the components of the overall pole attachment charge. The parties are in agreement with respect to certain of the cost components, but they disagree with respect to the majority of them. With respect to the calculation of the contribution to be made to common costs, over and above NSPI's incremental costs, the principal factors and components requiring consideration are the capital related costs and the determination of the space allocation factor to be applied to those costs. With respect to the incremental costs, there was disagreement regarding both the determination of the loss of productivity costs and administration costs.

[11] In this decision, the Board will review each component of the pole attachment charge and make findings as to the cost of the component. The aggregate of these components will establish a revised total pole attachment charge. The decision also includes discussion of issues that do not bear directly on the aggregate cost but warrant Board comment.

[12] NSPI's Annual Report for the year 2000, filed as a supplement to Undertaking U-3, indicates that its total revenue from electric operations was $813,300,000. NSPI's revenue from the pole attachment charge in 2000 was $1,472,000 which represented approximately 0.18% of NSPI's total revenue.

[13] The recent history of pole attachment charges in Nova Scotia is described in the

direct evidence of Christopher Huskilson, Chief Operating Officer for NSPI, as follows:

> *Pole attachment rates have been regulated in Nova Scotia by the Nova Scotia Utility and Review Board (NSUARB or the Board) since June, 1994, when the Board, by Order NSPI-P-132 approved the rates shown in the attached Schedule "A". Those rates applied only to the provision of cable television services, as attachments by the telephone company (MTT) were covered under a separate joint use agreement between NSPI and MTT.*
>
> *Prior to 1994, attachment rates for cable TV companies had been set by the provincial government, with the exception of a brief period between July 1992 and June 1994 when they were set by mutual agreement between NSPI and the cable companies.*
>
> *The rates approved by the NSUARB in 1994 (as set out in Schedule "A" above) continued in effect until March, 1996 when the Board approved a rate of $9.60 per pole per year, consistent with the rate that had been approved by the CRTC for MTT in June, 1995. Rates have remained at $9.60 per pole per year since that time.* (Ex. P-1, pp.1-2)

[14] NSPI provided a useful overview of the number of poles currently in service, their net value and the revenue obtained from the pole attachment charge in its response to EastLink IR-5. This information, together with the calculation of the net embedded cost per pole, is set out in the following table:

(a)	Approximate number of line poles	310300	
(b)	Approximate number of service poles	62060	
(c)	Approximate total number of poles	372360	
(d)	Net plant value of line poles		$114,022,000
(e)	Net plant value of service poles		$ 13,279,000
(f)	Total net value		$127,301,000
(g)	Total net value per pole[1]		$342.00
(h)	Total annual revenue from pole attachments for the last five years: i) 1996 ii) 1997 iii) 1998 iv) 1999 v) 2000		 $1,104,000 $1,215,000 $1,325,000 $1,406,000 $1,472,000

(Exhibit P-4, EastLink - IR-5)

[1] Also known as net embedded cost per pole.

1.0 COMPONENTS OF POLE ATTACHMENT CHARGE - NET EMBEDDED COST AND DEPRECIATION COST

1.1 Submission - NSPI

[15] During the hearing, NSPI amended certain of its previously filed calculations relating to certain of the components of the pole attachment charge. As a result, the revised elements of the charge as proposed by NSPI are set out in NSPI's post hearing brief as follows:

	NSPI Proposal
Net Embedded Cost per Pole($) (Weighted Average of 40 Foot Line Poles and 30 Foot Service Poles)	$342.00
Depreciation ($/pole)	$23.55
Interest ($/pole)	$47.06
Maintenance ($/pole) (Including Tree Trimming)	$11.55
Administrative Mark-Up	N/A
Total Capital Related Costs ($/pole) (Depreciation + Interest + Maintenance)	$82.16
Cable Distribution Allocation (%) (Space Allocation Factor)	16.5%
Contribution ($/pole) (Total Capital Related Cost x Cable Distribution Allocation)	$13.56
Loss in Productivity ($/pole) (Same as CRTC)	$3.15
Administration Costs ($/pole)	$0.51
Total Annual Cost per Pole (Contribution + Loss in Productivity + Administration Cost)	$17.22

(NSPI - Post-Hearing Brief, p.3)

[16] NSPI submits that each of the proposed components is reasonable and, therefore, the proposed charge of $17.22 should be approved. In his opening statement, Mr. Huskilson

elaborated on this proposal as follows:

> *This is an application by Nova Scotia Power to revise the annual pole attachment rate of nine dollars and sixty cents ($9.60) per pole for all pole attachments for communications, common carriers or broadcasters, exclusive of those served under a joint-use agreement. The current rate is set by the -- was set by the Board in the 1996 rate hearing. However, in the 1996 rate case decision, the Board directed Nova Scotia Power to resubmit its cost study. Nova Scotia Power's response to that directive is shown as Appendix "B" of our evidence where Nova Scotia Power calculated the cost per pole per year to be eleven dollars and ninety-nine cents ($11.99) on an incremental basis and twenty-two dollars and thirteen cents ($22.13) on an embedded-cost basis. Despite this, Nova Scotia Power has not applied to the UARB since 1996 to increase the rate, in part because of events transpiring before the courts and the Canadian Radio-Television Communications Commission, in Ontario. However, these events continue to be unresolved and Nova Scotia Power believes that the current rate must be amended for the following reasons. First, the current rate of nine dollars and sixty cents ($9.60) per pole per year is clearly below cost. Companies such as those who use our poles to provide cable TV service are paying less than their fair share of the costs associated with these poles. Secondly, a lot of our costs have gone up in the past few years and yet we have kept our prices to our electric customers stable. We are continuing to work hard to keep our costs down and to keep these prices stable. We do believe, however, that our electric customers should not have to continue to subsidize cable companies. Third, the increased rate we are proposing will bring the price paid more in line with the cost of providing pole-attached services and reduce, but not eliminate, the subsidy. Nova Scotia Power has filed a current cost study with its evidence which shows that a fully-allocated embedded cost rate of twenty-nine dollars and sixty-five cents ($29.65) per pole is appropriate. However, for reasons outlined in this application, Nova Scotia Power has applied for a rate which adopts and applies the methodology adopted by the CRTC in setting a rate in its Decision 99-13. That decision involved certain municipal utilities in the province of Ontario. We believe a proper application of that methodology results in an attachment rate of seventeen dollars and twenty-two cents ($17.22) per year, and Nova Scotia Power respectfully requests approval of that rate.*
>
> (April 23, 2001 - Transcript, pp.11-13)

1.2 Submission - Intervenors

[17] There is agreement among the parties with respect to the net embedded cost per pole of $342 and the depreciation cost of $23.55 per pole.

[18] However, there is significant disagreement with respect to the other components of the charge. Specifically, EastLink and Seaside object to the proposed interest expense, maintenance expense, allocation factor and cost attributable to loss of productivity, as well as

administration costs. Other Intervenors take issue with the scale of the proposed increase, stating that the increase sought is too high and will have a negative impact on cable customers, particularly in rural areas. The Competition Bureau, in its evidence, also questioned certain of NSPI's assumptions and calculations.

1.3 Findings

[19] From a review of the submissions, the Board is satisfied that the suggested net embedded cost per pole of $342 is a reasonable and appropriate starting point on which to base the pole attachment charge. The derivation of this figure is shown above on the table at p.5. This amount is, therefore, approved.

[20] The Board notes that NSPI has based its depreciation cost on the following allocation of pole and fixture assets:

Description	Electrical (000)	Shared (000)	Total (000)
Poles	0	$214,671	$214,671
Guys and Anchors	$35,684	$8,210	$43,894
Electrical Framing	$53,016	0	$53,016
Total	$88,700	$222,881	$311,581
Percentage	28%	72%	100%

(NSPI U-2)

[21] The Board accepts 72% as an appropriate allocation of NSPI's Poles and Fixtures Account. Applying 72% to NSPI's total depreciation expense applicable to poles and fixtures of $12,178,000 gives a shared depreciation expense of $8,768,160. [NSPI response to EastLink IR-11(e)] Dividing this number by the total number of poles gives a per pole cost of depreciation of $23.55.

Accordingly, the Board approves the proposed depreciation component of the pole attachment charge of $23.55 per pole.

2.0 DISPUTED CAPITAL COSTS

[22] Capital related costs are comprised of depreciation, interest [cost of capital] and maintenance costs. These costs are calculated using the net embedded cost per pole of $342 accepted by the Board. The interest cost includes grants in lieu of taxes, preferred dividends and interest, income taxes and return. "Interest" might more accurately be described as the "annual capital carrying cost."

2.1 Interest

2.1.1 Submission - NSPI

[23] In its post-hearing brief, NSPI pointed out that it has actual data regarding the costs which, it argues, should be used to calculate the interest cost. NSPI used the following data for purposes of determining the interest component of the pole attachment charge:

Grants in Lieu of Taxes	$745,000
Preferred Dividend & Interest	$13,313,000
Income Taxes	$1,667,000
Return	$8,613,000
Total Interest	**$24,338,000**

(NSPI - Response to EastLink IR-11(e))

[24] NSPI calculated the interest relating to shared assets as 72% of $24,338,000 or

$17,523,360. Dividing this amount by the total number of poles [372,360] results in an interest cost of $47.06 per pole, based on actual costs. This is equivalent to a rate of 13.8% [$47.06/$342.00].

[25] Mr. Huskilson and Melvin Whalen, Director, Regulatory Affairs and Rates for NSPI, both gave evidence with respect to NSPI's overall cost of capital, before and after tax, during their cross examination by Counsel for EastLink:

> *Q.* *On a going forward basis, Mr. Whalen, Nova Scotia Power can access capital at a weighted cost of 9.32 percent or something in that order of magnitude subject to market conditions?*
>
> *A.* *(Whalen) Yeah. That's what we calculate our current rate of weighted average cost to be, yeah.*
>
> *A.* *(Huskilson) It really depends on whether you're talking about the pre-tax or after-tax cost of capital. Our pre-tax is closer to 11.3. After-tax is in the order that you said.*
>
> *Q.* *Okay. And 11.3 is the sort of figure you're looking at going forward, Mr. Huskilson?*
>
> *A.* *(Huskilson) Pre-tax, that's right.*
>
> *Q.* *And by that, you mean that 11.3 takes into consideration income taxes in addition to debt and equity.*
>
> *A.* *(Huskilson) Yes, that's right.* (Transcript, Q. 201, p.78)

[26] In its post-hearing brief, NSPI states that if its proposed actual cost methodology is not approved by the Board, then the cost of capital should be 11.3% rather than 13.8%.

> *Using actual rather than estimated charges in the calculation of this rate is consistent with NSPI's normal cost allocation and rate design calculations. While NSPI strongly believes actual interest expense should be used, should the Board choose instead to apply a weighted average cost of capital to the embedded cost per pole, the pretax cost of capital to be employed should be the 11.3% as outlined in Undertaking U-6. That is the appropriate*

pretax cost of capital number. (NSPI - Post-Hearing Brief, p.6)

[27] In response to an undertaking, NSPI provided the following table to support the pre-tax weighted average cost of capital of 11.3%:

	% Capital Structure	After-Tax Cost	After-Tax WACC	Pre-Tax Cost	Pre-Tax WACC
Debt	58.0%	4.7%	2.7%	7.6%	4.4%
Preferred	7.0%	6.0%	0.4%	9.7%	0.7%
Common	35.0%	11.0%	3.9%	17.7%	6.2%
Total	**100.0%**		**7.0%**		**11.3%**
Assumed	38.00%				

(NSPI, Undertaking U-6)

[28] The table shows an after-tax weighted average cost of capital of 7.0% rather than the 9.32% used in Appendix D to NSPI's pre-filed evidence and referred to above by Mr. Whalen. The 7.0% figure reflects NSPI's future cost of debt once NSPI becomes taxable in 2003 at an income tax rate of 38%, rather than its average cost of debt.

2.1.2 Submission - Intervenors

[29] Eastlink submits that the weighted average cost of capital after tax should be used. In its written argument, Eastlink notes that in Decision 99-13 the CRTC used a capital rate of 8.5%, which was the rate of return which Ontario Hydro allowed the municipal utilities to earn. EastLink further notes that NSPI initially used a capital rate of 9.32%, which was based on its weighted average cost of capital, and justified this rate in its response to EastLink's Information Request IR-17(c). Using its actual capital related expenses, NSPI subsequently determined that

a rate of 13.8% should be used as shown above at p. 10. EastLink contends that this approach is inappropriate, since the methodology used by NSPI, as set out in its response to EastLink's Information Request IR-15(a), implicitly assigns financing costs to the poles category that are unrelated to the net plant value of the poles. EastLink concludes that the capital rate should be based on NSPI's cost of capital of 9.32%.

[30] In its submission, the Competition Bureau notes that its consultant, Mr. Ford, calculated a current cost of capital of 9.62% based on NSPI's 1999 financial statements [Undertaking U-9]. Adding an allowance for payments in lieu of taxes resulted in a annual capital carrying cost of 10.04%. The Bureau did not adopt Mr. Ford's calculation, however, and made the following submission at p.5 of its post-hearing brief:

> *The Bureau also understands that, on a forward-looking basis, the rate of corporate income tax will be approximately the 38% noted in Undertaking U-6. On that basis, and subject to the Board being satisfied that this is a reasonable rate of income tax on a forward-looking basis, the Bureau recommends in principle the use of a pre-tax cost of capital of 11.3%, provided that this figure is subject to the Board's continuous oversight. Inclusive of the grants in lieu of taxes of 0.4%, this would lead to a capital carrying cost of 11.7%. Based on the net embedded cost per pole of $342, this rate of capital carrying cost yields an annual capital carrying cost or "interest" in the amount of $40.01.*
>
> (Competition Bureau - Post-Hearing Brief, p.5)

[31] Seaside Cable submitted that the capital rate should be 10.04%, as calculated by Mr. Ford, and that the appropriate interest component per pole should not exceed $34.34.

2.1.3 Findings

[32] After carefully reviewing the various capital rates suggested, the Board considers that the appropriate capital rate is the weighted average pre-tax cost of capital of 11.3% plus 0.4%

for grants in lieu of taxes. In the Board's view, it is more appropriate to use the cost of capital which is applicable to the whole of NSPI's asset base, rather than calculating a number of different capital costs for different segments of the asset base.

[33] NSPI has stated that the use of actual data is consistent with the cost allocation methodology utilized for purposes of setting rates. However, since this proceeding is not a general rate hearing, a full cost of service study has not been filed. The Board may be prepared to revisit this issue if NSPI uses "actual data" to calculate the cost of pole attachments in a cost of service study presented in a future general rate case. At this time, however, the Board finds that a capital rate of 11.3% plus 0.4% for grants in lieu of taxes is reasonable, and, accordingly, approves an interest component of the pole attachment of 11.7% x $342.00 or $40.01 per pole.

2.2 Maintenance

2.2.1 Submission - NSPI

[34] In response to the Board's IR-23(d), NSPI stated that its proposed maintenance cost per pole of $11.55 was determined as follows:

Vegetation Management	$6.49
Emergency Repairs	$1.06
Inspection Surveys & Audits	$2.00
Pole Tests	$2.00
Total	**$11.55**

(Exhibit P-4, Board IR-23(d))

[35] In its response to Board IR-23(d), NSPI also indicated that the vegetation management cost of $6.49 comes from NSPI's accounting system records relating to

"... distribution tree trimmings." (Exhibit P-4, Board IR-23(d))

[36] NSPI submitted that all pole tenants benefit from tree trimming and that tree-trimming, along with inspection surveys and audits, emergency repairs and pole tests, is properly included in the overall cost of maintenance.

[37] Mr. Huskilson elaborated on the purpose of NSPI's vegetation management practices during cross-examination by counsel for HRM as follows:

> *48 Q. You stated earlier in your evidence that tree clearances have doubled, possibly tripled, since the joint-use agreement was prepared. Correct?*
>
> *LL.(Huskilson) Yes, that's correct.*
>
> *49 Q. And you also went on to state that these increased clearances as much allow control of costs as they do enhanced reliability. Do you recall that?*
>
> *A. (Huskilson) Well, they start out by enhancing reliability, and then if you can create a sustainable environment along the right-of-way, then you can improve your costs through time. But they start out primarily improving reliability.*
>
> (April 24/01 Transcript, Q48, p.198 - A. 49, p.199)

[38] In addition, under cross-examination by counsel for EastLink, NSPI asserted that the vegetation management cost should be included in the rate rather than leaving it to be negotiated by the parties:

> *A. (Whalen) We believe it's a whole lot easier, administratively easier to have it included as part of the rate. We believe it's consistent with the CRTC methodology because the maintenance part that we're talking about here is not incremental maintenance that we're talking about. It's total maintenance as are all the other pieces that go into that -- I believe what the CRTC refers to as the capital side. We believe it's more appropriate to put it in there.*
>
> (April 23/01 Transcript, A. 218, p.83)

[39] NSPI provided the methodology supporting the derivation of the cost for inspection surveys and audits of $2.00 per pole as follows:

28 staff x $\frac{2 \text{ months}}{12 \text{ months}}$ x $80 k = $373,333

Field staff spend an average two months per year on inspections, audits and surveys.

Total # of poles owned by NSPI = 372,360

Since pole inspections are done every two years, only ½ of the total are done on an annual basis (372,360 ÷ 2 = 186,180)

$373,333 ÷ 186,180 poles = $2.00 per pole

(NSPI, Undertaking U-4)

2.2.2 Submission - Intervenors

[40] The costs associated with vegetation management and inspection surveys and audits were of a considerable concern to the Intervenors.

[41] Seaside questioned whether any of NSPI's maintenance costs are attributable to the presence of cable on the poles. In its closing submission, Seaside states that:

> *While Seaside does not contest NSPI's annual maintenance costs, it strongly contests that any of these costs are contributed to or required by the presence of cable plant. NSPI carries out vegetation management or tree trimming in accordance with its own requirements and the standards under which it agreed to operate in the Joint Use Agreement. The Joint Use Agreement clearly mandates standards for tree trimming for joint use NSPI poles. Therefore, in the case of Joint Use Poles, the tree trimming requirements are dictated by the Agreement and not by the presence of cable plant.*
>
> (Seaside Closing Submissions - p. 12)

[42] Seaside also submitted that:

> *. . . NSPI's formula does not take into account the average cost per attachment and therefore overstates that portion of the cost which they attribute to the presence of cable plant.* (Seaside, Closing Submissions, pp.14-15)

[43] EastLink submitted that there is little, if any, incremental vegetation management required as a result of communication attachments. EastLink, in its response to NSPI IR-11(a) and (b), stated:

> (a) *Yes, in paragraph 212 of Decision 99-13, the Commission indicated:*
>
> *The Commission considers that maintenance costs should exclude tree trimming. Rather, the power utilities should be permitted to levy a separate charge on cable companies to reflect tree trimming activities. The Commission considers that this matter is best left to be resolved by the parties in the first instance. Furthermore, the Commission notes that in the Milton Hydro study, pole maintenance costs, excluding tree trimming, are $6.47 ($5.00 for pole testing and $1.47 for straightening). Consistent with the Commission's determination that the Milton Hydro data should be used in the rate calculation, maintenance costs of $6.47 will be included in the monthly pole rental rate.*
>
> *(rr) EastLink currently pays for tree-trimming for EastLink's construction activity for its own attachments.*
>
> *A distinction needs to be made between tree-trimming for plant/wires and tree trimming for poles. NSPI trims for plant, not poles. NSPI conducts tree-trimming primarily to keep conductors and other NSPI plant free from obstructions that could result in power service disruptions. Cable plant does not require the same clearance and is rarely affected unless tree limbs are directly weighing down the line. EastLink is prepared to undertake any clearance necessitated by this itself.*
>
> (EastLink response to NSPI IR-11(a) and (b))

[44] As a result, EastLink believes that a cost of $6.49 for vegetation management is too high. In addition, EastLink took issue with the annual cost of $80,000 per staff member that is included in the annual maintenance charge for inspections and surveys. Instead, EastLink suggests an amount of $50,000 per fully burdened staff member which would translate into $1.00 per pole. EastLink states that its proposed changes result in a maintenance cost of $3.06 per pole, rather than the $11.55 proposed by NSPI.

2.2.3 Findings

[45] The Board has reviewed the submissions of all parties with respect to whether the maintenance cost elements proposed by NSPI are properly part of the pole attachment charge calculation. The Intervenors take particular issue with the vegetation management cost of $6.49. The Board accepts NSPI's position that the vegetation management program is an essential part of maintaining the integrity of NSPI's overhead distribution system infrastructure. In the Board's view, it is also reasonable to conclude that the telecommunications companies benefit from this program. The Board finds a cost of $6.49 to be acceptable. Accordingly, the Board concurs with the appropriateness of assigning a portion of these costs to the telecommunications companies. The Board agrees with NSPI that the costs used to determine the inspection portion of the maintenance cost component reflect the cost of monitoring the condition of the poles and not the costs of verifying the number of attachments on the poles which are recovered directly from the individual cable companies. The Board finds that the other maintenance costs should be allocated to the telecommunications companies using the poles in the amounts proposed. Accordingly, the Board approves a total maintenance cost of $11.55 per pole for purposes of determining the pole attachment charge.

3.0 SPACE ALLOCATION FACTOR

3.1 Submission - NSPI

[46] The purpose of the space allocation factor is to assign an appropriate amount of the total annual capital related costs per pole to the customers who will pay the pole attachment

charge.

[47] Consistent with the methodology used by CRTC in Decision 99-13, NSPI has proposed that the "usable space" on a typical 40 foot pole be defined as power space, separations space and communications space. When measured in meters, the usable space consists of 4.86 meters. One-half of the communications space and the separations space is assigned to pole attachment customers. This distance is 0.80 meters. Dividing 0.80 by 4.86 gives a space allocation factor of 16.5%.

[48] In its response to Board IR-23(e), NSPI provided the measurements for the pole usage components from which the 16.5% allocation factor was derived:

> *This comes from NSPI Pole Attachment Cost Study dated Sept. 7, 2000. The calculation utilizes NSPI data and the CRTC philosophy. Please see the following table which shows the basis of the calculation of the cable distribution allocation of 16.5% for CATV. These figures are in meters:*

	NSPI	MTT	CATV	Total
Power	3.26			3.26
Separation		0.5	0.5	1
Communications		0.3	0.3	0.6
Clearance	n/a	n/a	n/a	n/a
Burial	n/a	n/a	n/a	n/a
Total	3.26	0.8	0.8	4.86
%	67.0%	16.5%	16.5%	100.0%

(Exhibit P-4, Board IR-23(e))

[49] NSPI notes in its post-hearing brief that the CRTC found at paragraph 222 of Decision 99-13 that "The expectation that all power utility poles will accommodate two communication users is reasonable." NSPI points out that in fact,

> *. . . the average number of attachments to an NSPI pole in Nova Scotia is slightly less than 2, in a range of 1.7 to 1.8 attachments per pole on average.*

(NSPI - Post-Hearing Brief, pp.11-12)

[50] Mr. Huskilson also stated that approximately 50,000 or one-third of the NSPI poles to which the cable companies attach are not joint-use poles [Tr. p.19, 23], meaning that the cable companies are the exclusive users of the communications space. NSPI submits that this fact weakens the Intervenors' argument that considerably less than 50% of the communications and separation space should be assigned to them.

[51] NSPI also pointed out that under the Joint-Use Agreement, the cost to MTT for using NSPI joint-use poles is "in the area of" $30 to $35 per pole, which is considerably higher than the rate being proposed for the cable companies.

[52] Further, NSPI took issue with the suggestion that the control exercised by MTT over the placement of cable on poles pursuant to the Joint-Use Agreement should be reflected in a reduction of the proposed space allocation to communications companies. This is illustrated in the following exchange between Mr. Huskilson and Counsel for EastLink:

> *Q 277. You have to in comparing rates look at the hierarchy within the communications space, do you not, and who is there and who controls the space?*
>
> *A. (Huskilson) I don't -- you keep talking about the hierarchy and the control of the communications space, and I can't for the life of me understand what that has to do with the bolt once it's on the pole. And, in fact, since you can't demonstrate here today that there is any circumstance where EastLink has been unable to attach to a pole, and you also can't demonstrate that there isn't going to be -- there isn't a situation in the future that disadvantages your organization by having the planning and control done by one entity or another, I don't understand what the point of the discussion about the control is. And I don't understand what the point of advantage versus disadvantage is when what we're talking about is a bolt on the side of a pole where the conductor hangs.* (Transcript - Q&A277 pp.108-109)

3.2 Submission - Intervenors

[53] GasWorks, in its closing submission, notes that:

> *. . . the pole 'is there anyway' because the other customers of NSPI pay through their rates to have it there. In paying to have it there these other customers must contribute to the carrying charges on that asset. It is not unreasonable to suggest that a tenant attachment should also contribute their fair share of those carrying charges.*
>
> (GasWorks, Closing Submission, p.1)

[54] The Competition Bureau, in its post-hearing submission, recommended a space allocation factor in the range of 11% to 15.5%:

> *In light of the evidence adduced during the hearing, such as control of the communications space, the joint use pole agreement, the relative weight of the cables, the relative amount of space used by Aliant/MTT and other users, the 6.6% figure proposed by EastLink and the 7.4% used by the Federal Communications Commission, Mr. Ford proposed a 2/3, 1/3 split for Aliant/MTT and other users, respectively* (Ford, Transcript p.282, Q68). *On the basis of this evidence, the Bureau recommends the Board adopt a cable distribution allocation in the range of 11% to 15.5% .* (Competition Bureau - Post-Hearing Submission, p.5-6)

[55] Seaside makes the following argument in its closing submissions:

> *NSPI claims a space allocation factor of 16.5%. This allocation factor is based upon the assumption that there are two (2) equal users of the communication space. Seaside contests this allocation on the basis that it is limited in its use of and access to the communications space. Seaside is of the view that the appropriate allocation factor should weigh the presence of MTT consistent with the Joint Use Agreement and considers the impact of Seaside's lack of ownership or control of the poles. . .*
>
> *With respect to Joint Use Poles, NSPI has chosen to provide control over communications space to MTT by virtue of the Joint Use Agreement. In those instances, MTT controls both the quantity and quality of access to poles. As the evidence indicates, Seaside is completely at the mercy of NSPI and MTT for pole attachment. As a result of MTT's control, in the vast majority of cases, Seaside's attachments have been relegated to the "field side" of the poles. This has a substantial impact on Seaside's installation and maintenance cost and a consequent effect on Seaside's ability to compete with MTT and others. It is evident from the evidence that Seaside has neither the rights of ownership, nor the advantages of control. The Board, in determining the appropriate attachment rate, must consider this lack of ownership and control and its impact on telecommunications tenants. . .*

In light of the historical allocation of communications space, Seaside submits [that] an allocation factor of 16.5% is prima facie unfair. Considering the historical allocation as well as the number of available attachment points, Seaside submits that the appropriate allocation is 6.6%. Although the evidence of the Competition Bureau suggested 11%, it is Seaside's view that this allocation did not take into consideration that there are typically 6 attachment points in the communications space. Mr. Ford left it to the Board to determine the appropriate allocation factor, having regard to the Joint Use Agreement and the impact of competitive equity within the communications space. In any event, Seaside submits that the appropriate allocation factor should be no higher than the 11% figure proposed by Mr. Ford. (Seaside - Closing Submissions, pp.15-17)

[56] EastLink, in its written argument, proposes that the space allocation factor should be between 6.6% and 11.0%. It makes the following argument in support of its position:

The allocation factor is used to allocate a reasonable proportion of the total annual fixed common costs as part of the pole attachment rate. In Decision 99-13, the CRTC established an allocation factor of 15.5%, which represented half of the total of usable space allocated to telecommunications tenants. Implicit in this allocation is an equal sharing of the communications space between telecommunications tenants. Since this factor is applied to the total annual fixed common costs, this methodology effectively allocates the "unusable" space on the pole (buried space and clearance) in the same proportion as the allocation of usable space. . .

EastLink proposes an allocation factor of 6.6% which is premised upon the allocation of the communications space which was specifically agreed between NSPI and MTT. Mr. Don Ford, in response to questions from Board counsel, suggested an allocation factor of 11% which is premised upon an allocation of 1/3 of the communications space and the separation space to the cable company. Mr. Ford also referred (in his oral evidence) to an allocation factor of 7.3% used by the FCC in the United States and (in his responses to Information Requests) to an allocation of 1/4 of the communications space to cable in CRTC Decision 86-16 which would translate to an allocation factor of 8.2% in this instance.

EastLink respectfully submits that the allocation factor should, in the circumstances of this proceeding, be in the range of the 6.6% proposed by EastLink and be no higher than the 11% referred to by Mr. Ford. (EastLink - Written Argument, pp.22-23; 26)

[57] EastLink's submission that a space allocation percentage of 6.6% would be appropriate is based on NSPI's response to Board IR-21. NSPI indicated in its response that its joint-use agreement with MTT assumes that approximately 80% of the communications space

would be utilized by MTT and 20% by other communications companies. Using NSPI's pole space figures measured in meters, (Board IR-23), 20% of the communications space and separation space is 0.32 meters which is 6.6% of the total usable space of 4.86 meters.

3.3 Findings

[58] The Board has considered the submissions of NSPI and the Intervenors as well as the views expressed by the CRTC in Decision 99-13, excerpts of which were filed as part of NSPI's evidence (Exhibit P-1, Appendix D). While the decision has been set aside for the reasons noted earlier, for the purposes of this decision, the Board finds the CRTC's approach to determining space allocation to be helpful. The CRTC said the following in paragraphs 222 to 224 of Decision 99-13:

> 2259. *The Commission is of the view that in determining the appropriate costs to be recovered from the cable companies, it is important to consider that they do not have the rights of ownership of the pole. Accordingly, the Commission considers that the fully distributed costing approach proposed by the MEA is not appropriate and that an allocation factor based on the percentage of usable space consumed is more reflective of a user's actual use and therefore is a more appropriate means of allocating costs. Furthermore, in light of increasing competition in broadcasting distribution and telecommunications and the potential for future growth in the number of communications space users, the Commission is of the view that the expectation that all power utility poles will accommodate two communications users is reasonable.*
>
> 223. *The Commission considers that the usable space on a 40 foot power utility pole, after allowance for clearance and buried pole, is 16.75 feet. Moreover, the Commission is of the view that the power utilities derive no benefits from the separation space, and that the separation space is necessary only to protect the employees and attachments of the communications companies. The Commission agrees with the MEA's comments that, without communications attachments, the power utilities could use the entire separation and communications space itself. Therefore, the Commission considers the separation space is causal to communications users. Accordingly, the separation space, as well as the communications space, will be allocated equally between two communications users.*

> *224. Based on the above, the Commission considers that the cable companies occupy one foot of the communications space and 1.6 feet of the separation space for a total of 2.6 feet of the 16.75 feet of usable space. Therefore the Commission determines that the resulting space allocation to cable companies is 15.5%.*
>
> (CRTC, Dec. 99-13, para.222,223& 224)

[59] The Board also finds the Competition Bureau's submission with respect to pole space allocation to be helpful. It stated in its post-hearing submission that:

> *In terms of the cable distribution allocation, under questioning by Board Counsel, Mr. Ford indicated he was reluctant to put forward a specific number* (Ford, Tr., page 282, Q68). *In Mr. Ford's evidence, he suggested that the cable distribution allocation should be no higher than the 15.5% used in Telecom Decision CRTC 99-13* (Exhibit P-12, p.11). *In light of the evidence adduced during the hearing, such as control of the communications space, the joint use pole agreement, the relative weight of the cables, the relative amount of space used by Aliant/MTT and other users, the 6.6% figure proposed by EastLink and the 7.4% used by the Federal Communications Commission, Mr. Ford proposed a 2/3,1/3 split for Aliant/MTT and other users, respectively* (Ford, Tr., page 282, Q68). *On the basis of this evidence, the Bureau recommends the Board adopt a cable distribution allocation in the range of 11% to 15.5%.*
>
> (Competition Bureau - Post-Hearing Submission, p.5-6)

[60] As indicated above, NSPI measured the relevant spaces on a 40 foot pole in meters. The use of meters resulted in a space allocation factor of 16.5% rather than 15.5% which the CRTC obtained when the pole spaces were measured in feet. NSPI did not attempt to justify why an allocation factor of 16.5% should be used rather than the 15.5% used by the CRTC. It is apparent that there is no difference in principle between the CRTC and NSPI which would account for the difference. The parties dealt with the space allocation factor in terms of "40 foot poles" rather than "12.2 meter poles". The Board considers that it is appropriate to use imperial units to measure the usage spaces on the pole in the same way the CRTC did and to treat the resulting space allocation factor determined by the CRTC as the relevant one for purposes of this decision.

[61] After considering the evidence and argument, the Board finds that a pole allocation factor of 15.5% is appropriate. Applying this percentage to NSPI's total capital related cost per pole yields a contribution of $11.64 [15.5% of $75.11]. The Board will include this amount in the calculation of the pole attachment charge.

[62] Given the continuing evolution of Nova Scotia cable companies into full communications carriers, the ownership and control concerns expressed by the Intervenors at this hearing with respect to the use of NSPI poles are unlikely to disappear in the near future. If the various parties making use of NSPI poles are unable to overcome these concerns through a process of voluntary negotiation, the Board may find it necessary to revisit the issue of an appropriate pole space allocation factor in a future pole attachment charge application.

4.0 LOSS OF PRODUCTIVITY COST

4.1 Submission - NSPI

[63] NSPI asserts that it should be compensated for the additional costs it incurs relating to the maintenance and servicing of poles as a result of the presence of cable attachments on them. The Competition Bureau explained the rationale for treating loss of productivity as an incremental cost as follows:

> *In the interests of competitive equity, all users of the communications space should pay their proportionate share of any loss in productivity incurred by the power utility as a result of the presence of telecommunications facilities in the communications space, based on their relative usage of the communications space.*
>
> (Competition Bureau, Response to UARB IR-1, para. 2)

[64] In its post-hearing submission, NSPI submits that it is justifiable to include a loss of productivity cost of $3.15 per pole in the calculation of its pole attachment charge for the

following reasons:

> *A higher pole is needed to accommodate telecommunication space. It is more difficult and costly to service NSPI equipment that is further off the ground. NSPI needs a bigger boom and therefore a bigger boom truck. A bigger boom truck takes more time to set up and depending on the roadway may need flag persons. NSPI in servicing its poles with communication attachments must be careful to work around the communication wire so as not to damage them. An NSPI lineman climbing the pole would have to get around the communications cables. Pole design to accommodate communications equipment is an additional complication. When the equipment has to be changed from one pole to another additional time and effort on the part of NSPI is required to coordinate other tenants moving their equipment. Sometimes there is a delay in cable companies moving their equipment. When a wire comes down often a citizen does not know whether it is the electric wire or a cable wire but usually it is the electric company that is called to remedy the problem.* (NSPI - Post-Hearing Brief, p.14)

[65] NSPI notes that its loss of productivity cost of $3.15 per pole is based on 1991 data filed with the CRTC in respect of a proceeding involving the use of the poles of municipal electric utilities. In view of the intervening time span, NSPI considers this number to be conservative, but *". . . a reasonable number for purposes of this application."*. (NSPI - Post-Hearing Brief, p.17)

4.2 Submission - Intervenors

[66] Seaside asserts in its closing submission that NSPI has made no effort to assess its actual productivity loss. Seaside further states that:

> *. . . in the case of Joint Use poles, there is no incremental productivity loss. In these cases, cable plant would be present along with MTT plant. The requirement for larger trucks, and for more time to be taken to work around cable plant, are costs incurred as a result of MTT's presence on the pole. This being the case, there are no more costs incurred as a result of the presence of cable plant.* (Seaside - Closing Submissions, p.8)

[67] EastLink states in its written argument that NSPI has not determined its own productivity losses and, as a result, there is insufficient evidence for the Board to consider this cost element.

[68] While noting that evidence is lacking upon which to base an opinion, Mr. Ford took issue with the $3.15 proposed by NSPI to reflect the productivity loss. In its post-hearing submission, the Competition Bureau noted that NSPI has not done any studies to support the $3.15 cost. Further, in his response to Board IR-1, Mr. Ford, speaking for the Competition Bureau, made the following comment on NSPI's $3.15 cost of productivity loss:

> *With respect to the application of the CRTC's methodology to NSPI's cost structure, as discussed in the evidence of EastLink's Panel beginning on Page 22, I would agree that NSPI has not provided evidence of any studies of productivity loss due to the presence of telecommunications facilities in the communications space on its poles. I would also point out that the figure of $3.15 used by the Commission in Decision 99-13 is much higher than one would expect for power utilities when studies of productivity loss conducted by the telephone companies, who share the communications space on poles with the cable companies, yielded annual costs in the range of $0.25 to $0.75 per pole per year. The cost due to loss in productivity for telephone companies was introduced by the CCTA, as noted at paragraph 188 of Decision 99-13.*
>
> *However, I disagree with EastLink's proposal that the cost due to loss in productivity should be based only on the incremental productivity loss caused by users of the communications space other than Aliant/MTT. In the interests of competitive equity, all users of the communications space should pay their proportionate share of any loss in productivity incurred by the power utility as a result of the presence of telecommunications facilities in the communications space, based on their relative usage of the communications space.* (Competition Bureau, Response to IR-1, para. 2)

[69] The Bureau recommended that a cost of $1.50 to $2.00 per pole per year be adopted pending further study.

[70] Under cross-examination, Mr. Ford, witness for the Competition Bureau, gave the following opinion when asked whether the $3.15 figure is reasonable.

Q. *All right. Based on the evidence you've heard at this hearing have you come to any opinion or conclusion with respect to the reasonableness of the three fifteen charge or cost involved with NSPI?*

A. *Well, as I said earlier when I was discussing this in my direct examination, I -- it's a number that seems to have appeared from nowhere and been attributed to many. And so I'm not really sure what the source of that number is. It was not a CCTA number as is alleged, I'd say inadvertently alleged, I would hasten to add. In Exhibit P-8 it was attributed I think to the MEA which I don't -- by the CRTC which -- and I don't think the MEA ever came up with that number. I think this was the only source of it and they referred to the CCTA number. Based on -- assuming that the telephone companies were correct in their numbers of 25 to 75 cents per pole per year in -- leading up to Decision [99-13], then I would certainly find the number of three fifteen to be considerably higher than I would have expected. But I can't comment further than that because there really isn't any evidence in that regard to comment on.* (Transcript, p.284)

4.3 Findings

[71] In the Board's view, it is reasonable to include an incremental cost for loss of productivity in the pole attachment charge. While NSPI has satisfied the Board that, in principle, such a cost is properly included in the pole attachment charge calculation, it has not provided sufficient evidence to support the proposed cost of $3.15. The Board agrees with the Intervenors that, without supporting data, it is not reasonable to simply accept the proposed cost of $3.15 per pole. Pending further study and documentation (which could be presented at the next pole attachment hearing), the Board finds that the Competition Bureau's estimate of $1.50 - $2.00 per pole is a reasonable and acceptable estimate for loss of productivity costs. Accordingly, the Board approves the sum of $2.00 as the productivity loss component of the pole attachment charge.

5.0 ADMINISTRATION COSTS

5.1 Submission - NSPI

[72] NSPI proposes an administration cost of $0.51 per pole. Administration costs are recurring incremental costs incurred by NSPI arising from the placement of attachments on NSPI's poles by cable companies. NSPI bases its proposed administration cost on a calculation of the cost of the Joint-Use Coordinator. The Joint-Use Coordinator's position is cost shared with MTT pursuant to the Joint-Use Agreement between MTT and NSPI. NSPI states that 50% of the Coordinator's time is spent dealing with telecommunications pole tenants.

[73] In response to EastLink IR-12(g), NSPI stated that:

> *NSPI's Joint Use Coordinator is required to spend 50% of his time administering the joint use agreement with Aliant and 50% on functions and activities for other telecommunications tenants. Therefore, NSPI included administrative costs of half his burdened cost, divided by the number of poles.* (Exhibit P-4, EastLink, IR-12(g))

[74] In Undertaking U-1, NSPI set out its derivation of the proposed $0.51 per pole as follows:

> *As of September, 2000 the calculation for the number of poles that are directly managed by the Joint-Use Coordinator is as follows:*

Total Attachments	150591
# of poles with 1 CATV tenant only	50000
# of poles with 1 CATV tenant and Aliant	96591
# of poles with 2 or more CATV tenants and Aliant	2000
therefore, the total # of poles with Attachments	148591
Fully Burdened Cost of Joint Use Co-ordinator: Salary + Fringe +A/O	$132,900
Travel and expense @ $1,500/month	$18,000
Total	$150,900
50% for CATV Attachment Activities	$75,450
Cost/Pole = $75,450 ÷ 148,591 poles	$0.51 per pole

(NSPI, Undertaking U-1)

[75] In its post-hearing brief, NSPI noted that the Competition Bureau adopted the $0.51 calculation in determining its pole attachment charge and that an administration cost of $0.62 was approved by the CRTC in Decision 99-13.

5.2 Submission - Intervenors

[76] In its closing submission, Seaside argues that the proposed administration cost is "*. . . entirely unreasonable and unsupported by the evidence.*" Seaside submits that NSPI has provided no evidence to support its assertion that 50% of the Joint-Use Coordinator's time is spent on non-joint use activities. Seaside points out that the position of the Joint-Use Coordinator

was created as a result of the Joint-Use Agreement between NSPI and MTT, and that the Agreement lists 16 specific responsibilities of the Coordinator. Seaside argues that NSPI has failed to prove its proposed administration charge, stating:

> *With respect, Seaside considers this figure entirely unreasonable and unsupported by the evidence. As the evidence indicates, Seaside, as well as the other cable and telecommunications providers pay substantial unregulated cost recovery charges to NSPI, including engineering and administrative charges at $200.00 per hour and $100.00 per hour. As we understand it, NSPI submits that in addition to recovery from the aforementioned charges, it should be permitted to include 50% of the costs associated with the Joint Use Coordinator. If this were the case, NSPI would be permitted to double recover all or part of its administrative costs.*
>
> *NSPI has produced its cost breakdown for the Joint Use Coordinator in NSPI Undertaking 1. This information as well as the remaining NSPI evidence must be considered in context. The position of Joint Use Coordinator was created as a result of the Joint Use Agreement. Under the Joint Use Agreement, both NSPI and MTT are required to employ a Coordinator. The applicable provision provides as follows:*
>
> > *1.03.02 Joint Use Co-ordinator*
> > *Reporting to the Joint Use Committee will be two Joint Use Co-ordinators - one from each party - whose duties will be to administer day-to-day Joint Use affairs.* (Joint-Use Agreement - Exhibit P-4, p.10)
>
> *This provision of the Joint Use Agreement goes on to enumerate no fewer than sixteen (16) specific administrative responsibilities of the Coordinator under the Agreement. Given these responsibilities, and the ratio of cable attachments to MTT and NSPI attachments, Seaside submits that it is unreasonable to allocate 50% of the Coordinators' time to activities outside the scope of the Joint Use Agreement. In addition, if this position is evaluated on an incremental cost basis, it is clear that this position is mandated by the Joint Use Agreement and not by the administration costs associated with cable plant. Moreover the Joint Use Agreement clearly contemplates that the costs of third party requests shall be billed on a cost recovery basis.* (Seaside-Closing Submissions, pp.10-11)

[77] EastLink, referring to the information provided by NSPI in Undertaking U-1, states that:

> *During cross-examination, Mr. Whalen estimated that the burdened cost of the Joint Use Co-ordinator was in the $60-$70K range.* (Evidence of Mel Whalen, Q.166, T. p.69-70) *In Undertaking U-1, NSPI provided the supporting calculation for the $0.51 figure. These show a fully burdened cost of $150.9K, a material change from the $60K- $70K range*

mentioned in evidence. This level of fully burdened costs is unreasonably high given the Joint Use Co-ordinator's position.

Based on the available information, EastLink believes that it would be appropriate for the Board to apply a fully burdened cost not to exceed $80K, with resulting incremental administration cost of $0.27 per pole calculated based upon an aggregate 150,591 poles.

(EastLink - Written Argument, p.19)

[78] The Competition Bureau, in its reply submission, makes the following comment on administration costs:

In its written argument, EastLink takes issue with the proposed annual incremental cost for administration of $0.51, proposing a cost of $0.27 based on a fully burdened annual cost not exceeding $80K. Seaside Cable, in its closing submission, deals with this matter in detail and in particular disagrees with NSPI's proposal to base the cost on 50% of the Joint Use Coordinator's time when administration of the use of communications space by cable companies is outside the scope of the Joint Use Agreement.

At page 3 of his evidence (Exhibit P-12), Mr. Ford listed some of the administrative activities whose costs would be included in the administrative cost category (contract preparation, permit issuance, inspection, billing and collection). The Bureau did not deal with the magnitude of the proposed incremental cost of administration, believing the magnitude of the proposed annual cost of $0.51 per pole to be reasonable. Indeed, the Bureau would note that the cost to NSPI of its participation in the present proceeding should be considered an incremental or causally-related cost of administration of pole leases. Therefore, while the Bureau does not agree with the methodology used by NSPI to arrive at the estimate (50% of the Joint Use Coordinator's burdened cost), it nevertheless finds the proposed annual cost of $0.51 per pole a reasonable estimate until such time as a more detailed estimate of the cost of the various administrative activities related to leasing pole space has been developed by NSPI.

(Competition Bureau - Reply Submission, p.3)

5.3 Findings

[79] The Board has carefully considered the arguments of the Applicant and the Intervenors on this issue. The Board has found the comments of the Competition Bureau to be helpful. The submissions of Intervenors on this point, (particularly EastLink's suggested $0.27), are not supported by any specific evidence. On the whole, the Board prefers the evidence of

NSPI. Accordingly, the Board approves an administrative cost component of $0.51 for inclusion in the aggregate pole attachment charge. The Board notes that $0.51 is lower than the $0.62 approved by the CRTC in Decision 99-13.

6.0 AGGREGATION OF COSTS

6.1 Findings

[80] The total of the various cost components of the proposed pole attachment charge proposed by NSPI is $17.22 per pole per year. The following table compares the components of the pole attachment rate suggested by NSPI and certain of the Intervenors with that approved by the Board.

Pole Attachment Costs	1	2	3	4	5
Table A	**NSPI Revised Proposal**	**Competition Bureau Modification**	**EastLink**	**Seaside Cable**	**Board Approved**
Net Embedded Cost Per Pole ($) (Weighted Average of 40 ft. Line Poles and 30 ft. Service Poles)	$342	$342	$342	$342	**$342**
Depreciation ($/pole)	$23.55	$23.55	$23.55	$23.55	**$23.55**
Interest ($/pole)	$47.06	$40.01	$31.87	$34.34	**$40.01**
Maintenance ($/pole) (including Tree Trimming)	$11.55	$11.55	$3.06	0	**$11.55**
Administrative Mark-Up	N/A	N/A	N/A	N/A	**N/A**
Total Capital Related Cost ($/pole) (Depreciation + Interest + Maintenance)	$82.16	$75.11	$58.48	$57.89	**$75.11**
Cable Distribution Allocation (%) (Space Allocation Factor)	16.5%	11.0-15.5%	6.6%	6.6%	**15.5%**
Contribution ($/pole) (Total Capital Related Cost x Cable Distribution Allocation)	$13.56	$8.26-$11.64	$3.86	$3.82	**$11.64**
Loss in Productivity ($/pole)	$3.15	$1.50-$2.00	0	0	**$2.00**
Administration Costs ($/pole)	$0.51	$0.51	$0.27	0	**$0.51**
Total Annual Cost Per Pole (Contribution + Loss in Productivity + Administration Cost)	$17.22	$10.27-$14.15	$4.13	$3.82	**$14.15**

Note: Col. (1) from Table A of NSPI Post-hearing brief
Col. (2) derived from information included in Competition Bureau's Closing Submission
Col. (3) from Comparative Attachment Rate Calculations [Exhibit P-7] and Written Argument
Col. (4) based on information in Seaside's Closing Submissions

[81] Seaside submitted that the Board should not approve any increase in the pole attachment charge given the preferred access to NSPI's poles enjoyed by MTT. EastLink submitted in its written argument that the pole attachment rate should not exceed the existing

$9.60 rate. The Competition Bureau recommended in its closing submission that the Board approve a pole attachment rate in the range of $10.27 to $14.15.

[82] Based on its findings respecting the various components of the pole attachment charge noted earlier, the Board approves a pole attachment charge of $14.15. The components are set out in the table on the previous page.

7.0 OTHER ISSUES

7.1 Fairness of Access

7.1.1 Submission - NSPI

[83] The issue of the ability of the cable companies to gain access to NSPI's poles and the extent of control over these poles that is exercised by MTT/Aliant was raised by the Intervenors during the hearing. In its post-hearing submission NSPI states that:

> "*It was the evidence of NSPI that cable companies are always able to attach to NSPI poles.*
> (NSPI - Post-Hearing Brief p.12)

[84] In his evidence, Mr. Whalen stated that:

> "*. . . We do whatever is required to accommodate the cable company on the pole.*"
> (Transcript, p.38)

7.1.2 Submission - Intervenors

[85] The Competition Bureau addressed the issue of fairness of access in its post-hearing submission, stating that:

> *It appears that the joint pole agreement between NSPI and Aliant/MTT will not continue* (NSPI Panel - Huskilson, Tr. p.119, Q304-305). *Whether the joint use pole agreement does or does not continue, it is important that no party be permitted to deny others access to the communications space on the pole. Moreover, the Bureau believes that any*

> *advantages such as those received by Aliant/MTT under the present arrangement between NSPI and Aliant/MTT should be reflected in the rate paid by the user to whom the advantages accrue. In the present case, as discussed above, it is appropriate for Aliant/MTT to be allocated a larger share of the fixed common costs than is allocated to other users of the communications space.* (Competition Bureau - Post-Hearing Submission, p.9)

[86] Seaside submitted that because it controls the communications space on NSPI poles, MTT has been able to discriminate against Seaside by relegating its attachments to the "field" side of the communications space on NSPI's poles. Seaside pointed out that it is more expensive to attach to the field side of the pole. Seaside recommended that the Board consider the preferred position enjoyed by MTT in setting the pole attachment rate and quoted Mr. Ford's testimony in that regard as follows:

> *If the Board wanted to eliminate or even up the score, as it were, in terms of preferential treatment . . . ., it could presumably do so by arriving at what in its judgement is an appropriate rate reflecting those advantages.* (Transcript, p.276-277)

7.1.3 Findings

[87] The Board is not persuaded that the Intervenors are unduly impacted by the present NSPI-MTT joint-use pole agreement. Given NSPI's evidence that the cost to MTT to access NSPI's poles is substantially more than the proposed pole attachment charge, the Board is not prepared to make any adjustment to the rate derived from an application of the CRTC methodology at this time.

7.2 Capital Contribution

7.2.1 Submission - NSPI

[88] In its original submission, NSPI proposed to collect a capital contribution

applicable to new poles whose height exceeds that required by the utility for its own use. In addition, NSPI would continue to charge the full pole rate. Mr. Huskilson described NSPI's position in the following exchange with EastLink's Counsel:

Q. *What is the order of magnitude of the capital contribution that you're talking about, sir?*

A. *(Huskilson) It'd be hard to say that here, but it's hundreds of dollars, I would say.*

Q. *And hundreds of dollars calculated how?*

A. *(Huskilson) The incremental cost of providing a higher pole and a system that is over and above the system for the electricity supply.*

Q. *And in stating your evidence as you have, you assume no joint use agreement going forward?*

A. *(Huskilson) That's what we assume. That's correct.*

Q. *Is this an arrangement which has been discussed in the context of a potential deal with Aliant?*

A. *(Huskilson) This is our view of the most prudent way to move the electricity company forward and has nothing to do with Aliant.*

Q. *And after the cable companies make this kind of contribution, if they are ever required to do so, is it then Nova Scotia Power's intent to charge the cable companies the full pole attachment rate in addition?*

A. *(Huskilson) Yes. That would be correct because that would in fact be appropriate for that circumstance.*

Q. *Is Nova Scotia Power proposing that the regulations in which the pole attachment rate are contained be amended to reflect this new practice on its part, or are you just indicating that this is your intended practice going forward?*

A. *(Huskilson) We don't believe that the regulations have to change in order for us to move forward in this way. You see, Nova Scotia Power has sort of more or less, I think, on its own built plant that was communications ready. And that's something that we have done as part -- as a matter of a standard. And it, I think, has been in line with the kind of past that we've had about ensuring that telecommunications was being provided. And what we're saying here today is that it's important that those telecommunications companies pay their fair share of the cost and that it not be cross subsidized by electricity customers.*
(Emphasis added) (Transcript p.119-121, Q302 - A307)

NSPI addressed the issue of "double-counting" in its post hearing brief as follows:

NSPI in its evidence indicated that future, new or replacement poles will be designed to meet the needs of NSPI and that additional capital costs will be required through an up-front contribution.

Questions were raised as to whether that would lead to double counting if the applied for rate stayed in place. The answer is no. Any capital contribution by a customer does not become part of the assets on the books of NSPI upon which costs which go into the rate are calculated. That is the case today with make-ready costs. This was explained by Mr. Whalen:

"109. Q. With respect to -- if I can get you to turn to page 5 of P-1, which is the original application. And I'm particularly looking at the last three lines, 5, 6 and 7, and your comment that you're intending to charge for new poles any incremental cost involved in that process above the allowed rate that would be allowed through this hearing. Can you explain to me why that doesn't involved a sort of double-counting.

A (Whalen) No, it won't involve a double-counting because any contribution that is made by a third party is not -- does not become part of our asset base. So, it won't drive any depreciation charges for us, it won't drive any interest charges for us. It's the same way now when we do work for a customer and the customer makes a capital contribution. If we extend a line and the customer makes a capital contribution, the capital contribution is netted out, if you will, of what actually goes on the books of the company that drives depreciation charges so that it won't be a double-count.

110. Q. But aren't there already components of the cost of putting in a new pole that are included in your calculation to arrive at the rate you're applying for today?

A. (Whalen) And those charges would still be there in putting in a new pole. It's only the net difference that we're asking be made the capital contribution.

. . .

111. A. (Whalen) But what we're saying is that if we, for our own purposes, would have built a 35-foot pole that, let's say, we would have paid, let's say, a thousand dollars ($1,000) for, and in order to accommodate telecommunications we would have, let's say, spent thirteen hundred dollars ($1,300) for a pole. The additional three hundred dollars ($300) is what we're talking about would be the capital contribution and would not on a go-forward basis have an impact on depreciation charges. The

> *initial one thousand of the thirty-five would go in and would impact depreciation charges and so on on a go-forward basis.*
>
> (NSPI Post Hearing Brief, p.18-19)

7.2.2 Submission - Intervenors

[89] The Competition Bureau recommended that the pole attachment charge should be reduced for those customers making a capital contribution. The Bureau notes that:

> *In cross-examination by Counsel for the Board, Mr. Ford pointed out that the rate for poles for which an up-front capital contribution had been made should cover only incremental or causal costs and an appropriate share of the pole maintenance costs* (Ford, Tr. pp. 286-287, Q73). *As Mr. Ford explained, by making an up-front capital contribution, the user of the communications space was already making the appropriate contribution to depreciation and capital carrying cost.*
>
> (Competition Bureau -Post-Hearing Submission, p.10)

[90] EastLink argues that the Board should not permit NSPI to implement an up-front capital contribution

> *". . . in the absence of the establishment of a new rate applicable to new poles".*
>
> (EastLink - Written Argument, p.37)

[91] EastLink also stated in its reply brief that:

> *It is respectfully submitted that NSPI's proposal will lead to double recovery.*
>
> *While NSPI is correct that "[a]ny capital contribution by a customer does not become part of the rate base upon which costs which go into the rate are calculated", the base of poles included in the rate base upon which cable companies and others will contribute is based on a pole which is engineered and designed for communications space. These companies will have also paid through the capital contribution charge for a pole which has been designed for communications attachments. This is double counting.*
>
> (EastLink - Reply Submission, p.5)

7.2.3 Findings

[92] The Board dealt with the issue of whether a capital contribution is a rate subject to the approval of the UARB in a 1999 decision on a complaint against the Halifax Regional Water Commission by Armoyan Group Ltd. and Annapolis Basin Pulp and Power Company Ltd.

(Armoyan). The Board made the following finding in that decision:

> *It is true that the capital contribution charges levied by utilities do not typically appear in the standard "rates" section of utility tariffs. However, whether they appear in the Rules and Regulations section of a utility's tariff, as in the case of the Bedford South WSD capital cost contribution charge, and in the case of the provisions in the Board-approved Rules and Regulations of Nova Scotia Power Inc. with respect to overhead line and service extensions and underground electric services, or in the form of ad hoc Board orders, as in the case of the 1961 Halifax Public Service Commission decision, the fact remains that the utility is receiving compensation for the extension of utility service. The charge is collected "up-front", it is true, but it is a charge nonetheless. It lowers the utility's overall cost of extending service and thereby reduces the burden on existing customers who otherwise more likely than not would have to pay higher service rates.*
>
> (NSUARB-W-HALC-C-95 & W-HFXR-C-96, pp.40-41)

[93] As NSPI has not placed a capital contribution charge proposal before the Board, it would not be appropriate for the Board to take a position on such a charge in this decision. If NSPI wishes to impose a capital contribution charge, it should make an application to the Board. The Board is prepared to hear further submissions with respect to this matter should NSPI bring an application forward. Accordingly, in the interim, poles will continue to be installed in the usual manner and the full approved pole attachment charge will be applied to all users.

7.3 Purchase of MTT Poles

[94] With regard to the possible purchase of MTT poles by NSPI, EastLink noted that because of the limited information provided, the current relationship between MTT and NSPI is unclear. EastLink further stated that should such a purchase occur, the economics of pole ownership and operation would be fundamentally changed. The Board reminds all parties that, under the **Act**, NSPI cannot undertake such a purchase without Board approval. As with all capital acquisitions which are subject to the Board's review, the implications of the proposed

capital expenditure are considered as well as whether a hearing on the matter is warranted.

8.0 CONCLUSIONS

[95] For the reasons given above, the Board approves a new pole attachment charge of $14.15 per pole per year effective January 24 , 2002. An amended Schedule of Charges is set forth in Schedule 'A', attached.

[96] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 24th day of January, 2002.

John A. Morash, C.A., Chair

Margaret A. M. Shears, Vice-chair

John L. Harris, Q.C., Member

NSPI Regulation

7.1 SCHEDULE OF CHARGES

The following charges shall apply:

(a)	Connection or reconnection of electric service, whether metered or unmetered, to any premises during the Company's normal working hours.	$18.00 standard charge
(b)	Connection or reconnection of electric service, whether metered or unmetered, to any premises after the Company's normal working hours, if requested by the Customer and is not a reconnection for non payment.	$18.00 standard charge plus $50.00 charge for additional costs.
(c)	Reconnection of electric service, whether metered or unmetered, to any premises after the Company's normal working hours, if requested by the Customer and is a reconnection associated with non payment.	$18.00 standard charge plus $50.00 charge for additional costs.
(d)	Connection or reconnection of electric service to premises serviced by temporary service in accordance with these Regulations.	$18.00 standard charge plus all other costs incurred by the Company in connecting or reconnecting service
(e)	Collection Charge	$13.00 standard charge
(f)	Disconnection-Seasonal Electric Service	$25.00 standard charge
(g)	Returned Cheque Charge	$15.00
(h)	Late Payment Charge	a one-time charge of 5% of current amount.

7.1 SCHEDULE OF CHARGES - *Continued*

(i)	Interest on Deposits	8% per annum (simple interest)
(j)	Dispute Test Fee re satisfactory meter	$25.00
(k)	Standard Contribution for three-phase service 15 kW and under	$800.00
(l)	Charge for installation of Recording Equipment	
	• 240 volt single phase voltage recorder	$25.00
	• all other recording equipment	Actual Costs incurred by the Company
(m)	Service Charge for any miscellaneous requests.	Actual Costs incurred by the Company
(n)	All pole attachments for telecommunication common carriers, or broadcasters, exclusive of those under joint use agreements.	$14.15 per pole per year
(o)	Access to NSPI Mobile Radio Network	Monthly Charge
	- Basic Dispatch Service	$26.00
	- Individual/Group Call Feature	$21.00
	- Networking Features	$11.00
	- Interconnect Facility (PSTN) Access	$41.00

Attachment 6
to the
Evidence of
David McKeown,
View Communications Inc.

August 21, 2015

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CS Docket No. 97-98
Amendment of Rules and Policies	)	
Governing Pole Attachments	)	

REPORT AND ORDER

Adopted: March 29, 2000 Released: April 3, 2000

By the Commission:

TABLE OF CONTENTS

Paragraph No.

I. INTRODUCTION 1

II. BACKGROUND 2

III. PRICING METHODOLOGIES FOR USE IN POLE ATTACHMENT FORMULAS 7
- A. Background 7
- B. Discussion 8
  - 1. Modification of *Cable Formula* 8
  - 2. Gross Book versus Net Book Costs 11

IV. ARMIS UNIFORM SYSTEMS OF ACCOUNTS FOR LEC POLE OWNERS 12

V. FORMULA FOR DETERMINING ATTACHMENT RATES FOR POLES 14
- A. Percentage of Usable Space Occupied 16
  - 1. Background 16
  - 2. Discussion 19
    - a. Safety Space 20
    - b. Minimum Ground Clearance 23
    - c. 30 Foot Poles 25
    - d. Weight and Wind Load Factors 27
- B. Cost of a Bare Pole 31
  - 1. LEC Pole Owner Formula Methodology 32
  - 2. Electric Utility Pole Owner Formula Methodology 36
  - 3. Total Number of Poles 43

C. Carrying Charge Rate 44
1. Administrative Element 46
2. Maintenance Element 53
a. Pole Rental Expenses Paid to Third Party 54
b. FERC Account 590 57
3. Depreciation Element 62
4. Taxes Element 71
5. Rate of Return Element 74

VI. FORMULA FOR DETERMINING ATTACHMENT RATES FOR CONDUITS 77
A. Background 77
B. Discussion 82
1. Conduit Formula Methodology 82
2. Conduit Physical Characteristics 84
3. Factors of the Conduit Formula 86
a. Percentage of Total Capacity Occupied 89
i. Total Duct or Conduit Capacity 89
ii. Occupied Capacity, the Half-Duct Presumption 92
4. Net Linear Cost of Conduit 96
a. Net Conduit Investment 97
b. System Duct Length 104
5. Carrying Charge Rate 105
a. Maintenance Element 108
i. LEC Owned Conduit 109
ii. Electric Utility Owned Conduit 111
b. Depreciation Element 113

VII. REGULATORY FLEXIBILITY 115
VIII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS 156
IX. ORDERING CLAUSES 158

APPENDIX A - Revised Rules
APPENDIX B - List of Commenters
APPENDIX C - Section 224 (d) Formulas for Attachments on Poles and in Conduit

I. INTRODUCTION

1. This *Report and Order* ("*Order*") addresses issues raised in *Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, CS Docket No. 97-98 ("*Notice*")[1] relating to the maximum just and reasonable rates utilities[2] may charge for "pole attachments"[3] made to a pole, duct, conduit or right-of-way.[4] Generally, the commenters[5] represent the interests of one of the following three categories: (1) electric utilities;[6] (2) cable operators;[7] and (3) telecommunications carriers.[8] In this *Order*, we adopt amended rules set forth in Appendix A.

II. BACKGROUND

2. Section 224 of the Communications Act ("Pole Attachment Act")[9] grants the Commission authority to regulate the rates, terms, and conditions[10] governing pole attachments and requires that such

[1] 12 FCC Rcd 7449 (1997).

[2] A "utility" is defined as any person who 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 who is cooperatively organized, or any person owned by the Federal Government or any State. 47 U.S.C. § 224(a)1).

[3] The term "pole attachment" is defined as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4).

[4] 47 U.S.C. § 224; 47 C.F.R. §§ 1.1401-1.1416.

[5] A list of commenters, as well as the abbreviations used in this *Order* to refer to such parties, is contained in Appendix B hereto.

[6] Commenting electric utilities generally include American Electric, Carolina Power, Chugach, ConEd, Duquesne Light, Edison Electric/UTC, Ohio Edison, Public Service of New Mexico, Southeastern Indiana REMC, and Union Electric.

[7] Commenting cable operator interests generally include NCTA, SCBA, TCI, Time Warner, and WorldCom.

[8] Commenting telecommunications carrier interests generally include Ameritech, Association of Local Telecommunications Services, AT&T, Bell Atlantic/NYNEX, BellSouth, GTE, KMC Telecom, MCI, Qwest, SBC, SNET, Sprint, USTA, and U S West. Some telecommunications carriers are local exchange carriers who are also pole owners.

[9] Communications Act of 1934, *as amended* by Pub. L. No. 95-234, 47 U.S.C. § 224.

[10] 47 U.S.C. § 224.

rates, terms and conditions be just and reasonable.[11] The Commission is also authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[12] In 1978, when Congress directed the Commission to regulate rates for pole attachments used for the provision of cable service, Congress established a zone of reasonableness for such rates, bounded on the lower end by incremental costs[13] and on the upper end by fully allocated costs.[14] *See* S. Rep. No. 95-580 ("*1977 Senate Report*").[15]

3. Beginning in 1978, the Commission developed a methodology to determine the maximum allowable pole attachment rate under Section 224(d)(1), (the "*Cable Formula*"),[16] in *Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, CC Docket No. 78-144 ("*First Report and Order*");[17] *Second Report and Order* ("*Second Report and Order*");[18] and *Memorandum and Order* ("*Third Order*"),[19] implementing a cost methodology premised on historical or embedded costs.[20] In 1987, the Commission amended and clarified the methodology for determining rates in *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility*

[11]The Commission's authority does not extend to pole attachment rates, terms, and conditions that a state regulates. 47 U.S.C. § 224(c)(1). Jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission, with respect to individual matters, also occurs if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 U.S.C. § 224(c)(3).

[12]47 U.S.C. § 224(b)(1).

[13]*See* 47 U.S.C. § 224(d)(1). In the pole attachment context, incremental costs are those costs that the utility would not have incurred "but for" the pole attachments in question.

[14]*Id.* Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.

[15]S. Rep. No. 95-580, 95th Cong., 1st Sess. 19 (1977).

[16]47 C.F.R. § 1.1404.

[17]68 FCC 2d 1585 (1978).

[18]72 FCC 2d 59 (1979).

[19]77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam).

[20]72 FCC 2d at 66, ¶ 15. Historical costs are costs that a firm has incurred in the past for providing a good or service and are recorded for accounting purposes as past operating expenses and depreciation.

Poles, CC Docket No. 86-212 (*"Pole Attachment Order"*).[21]

4. The Telecommunications Act of 1996 ("1996 Act")[22] amended Section 224 in several important respects. Section 703(6) of the 1996 Act added a new Subsection 224(d)(3),[23] that expanded the scope of Section 224 by applying the *Cable Formula* to rates for pole attachments made by telecommunications carriers[24] in addition to cable systems,[25] until a separate methodology becomes effective for telecommunications carriers.[26] Section 703(7) of the 1996 Act added new Subsections 224(e)(1-4), which set forth a separate methodology to govern charges for pole attachments used to provide telecommunications services.[27]

5. In *Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151 (*"Telecommunications Report and Order"*), the Commission adopted a separate methodology for pole attachments on poles (*"Telecommunications Pole Formula"*) and in conduits (*"Telecommunications Conduit Formula"*) for providers of telecommunications services, including cable systems providing telecommunications services, after February 8, 2001.[28] Revisions to the *Cable Formula* and the formula for pole attachment rates in conduit systems adopted in this *Order* will apply to attachments made by cable systems and, until the *Telecommunications Pole Formula* and the *Telecommunications Conduit Formula* become effective in 2001, will also apply to attachments by telecommunications carriers providing telecommunications services.[29] After February 8, 2001,[30] the *Cable Formula* for poles and the formula adopted for pole attachments in conduit systems adopted in this *Order*, will continue to apply to pole attachments used by a cable television system, as long as the pole attachment

---

[21] 2 FCC Rcd 4387 (1987).

[22] Pub. L. No. 104-104, 104 Stat. 56, 149-151 (codified at 47 U.S.C. § 224).

[23] 47 U.S.C. § 224(d)(3).

[24] 47 U.S.C. § 153(44).

[25] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[26] *See* 47 U.S.C. § 224(d)(3) (only to the extent that such carrier is not a party to a pole attachment agreement) and 47 U.S.C. § 224(e)(4).

[27] 47 U.S.C. § 224(e)(1-4).

[28] 13 FCC Rcd 6777 (1998), ¶¶ 116-130.

[29] *See* 47 U.S.C. § 224(d)(3) (but only to the extent that such carrier is not a party to a pole attachment agreement); *cf.* 47 U.S.C. § 224(e)(1).

[30] *See* 47 U.S.C. § 224(d)(3).

is not also used to provide telecommunications services.[31]

6. In the *Notice*, we sought comment to evaluate the accuracy of the *Cable Formula*, to evaluate and revise certain accounting rules,[32] and to consider the continued applicability of certain presumptions.[33] We sought comment regarding a methodology for use in determining just and reasonable pole attachment rates for conduit systems.[34] We also sought comment on whether, due to the reported frequency with which accumulated depreciation balances exceed gross pole investment, a modification of the *Cable Formula* was necessary.[35]

III. PRICING METHODOLOGIES FOR USE IN POLE ATTACHMENT FORMULAS

A. Background

7. When Congress enacted Section 224 in 1978, it directed the Commission to institute an expeditious program for determining just and reasonable pole attachment rates. Legislative history indicates that Congress was concerned with regulatory complexity, opting for a simple plan requiring a minimum of staff, paperwork and procedures and the avoidance of a large-scale ratemaking proceeding.[36] Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, for example forms submitted to the Commission by local exchange carriers ("LECs") and to the Federal Energy Regulatory Commission ("FERC") for electric utilities.[37] Congress

[31] The statute states that the § 224(d) rate shall apply for any pole attachment used by a cable television system "solely to provide cable services, . . . [and] subsection (e), . . . shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier . . . to provide any telecommunications service." 47 U.S.C. § 224(d)(3).

[32] *Notice* at ¶¶ 1, 30-37.

[33] *Notice* at ¶¶ 1, 17-20.

[34] *Notice* at ¶¶ 1, 38-46.

[35] *Notice* at ¶¶ 17, 21-29.

[36] *1977 Senate Report* at 21; see also NCTA Comments at 6-7.

[37] *1977 Senate Report* at 20 ("Further, there may be some difficulty in determining the components of "actual" capital costs. As to some of these factors, the committee expects that the Commission will have to make its best estimate of some of the less readily identifiable actual capital costs. Special accounting measures or studies should not be necessary."). *See also* 47 C.F.R. § 1.1404(g)(12), (h). Incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are regulated by the Commission Rules at 47 U.S.C. Title II. Electric, gas, water, steam and oil utilities are regulated by FERC, an independent regulatory agency within the Department of Energy under authority from the Federal Power Act of 1935, 49 Stat. 847; the Natural Gas Act of

also did not expect the Commission to re-examine the reasonableness of the cost methodologies that various regulatory agencies had sanctioned. Section 224(d)(1) describes two possible cost methodologies, incremental and fully allocated, each of which is based on the "actual" capital costs of construction and operation of the pole attachment infrastructure (poles, ducts, conduit and rights-of-way).[38] Since 1978, the Commission, in interpreting this statutory language, chose an embedded cost methodology, which has been upheld by the United States Supreme Court.[39] Congress expected that pole attachment rates based on incremental costs would be low, because utilities generally recover the make-ready or change-out charges directly from cable systems.[40] On the other hand, fully allocated costs constitute the basis of the upper boundary of the range of just and reasonable rates.[41] The Commission noted that in arriving at an appropriate rate, it is important to ensure that the attaching entity is not charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account.[42]

B. Discussion

1. Modification of the *Cable Formula*

8. In the *Notice,* we solicited comment on proposed modifications to the *Cable Formula* and the Commission's rules relating to the maximum just and reasonable rates utilities may charge for pole attachments.[43] We also sought comment on whether a modification is necessary to improve the accuracy of

---

1938, 52 Stat. 821; the Natural Gas Policy Act of 1978, 92 Stat. 3350, Pub. L. No. 95-621; the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, Pub. L. No. 95-617; and the Energy Policy Act of 1992, 106 Stat. 2776, Pub. L. No. 102-486.

[38] *See Gulf Power, et al. v. USA, et al.*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd,* 187 F.3d 1324 (11th Cir. 1999).

[39] *See First Report and Order*, 68 FCC Rcd 1585, ¶ 25; *aff'd, Second Report and Order*, 72 FCC 2d 59, ¶ 15; *see also FCC v. Florida Power Corporation*, 480 U.S. 245 (1987).

[40] *1977 Senate Report* at 19. "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See 1977 Senate Report* at 19. A pole "change-out" is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405 n.3.

[41] 72 FCC 2d 59, 72 at ¶ 23 (citing *1977 Senate Report* at 20) (emphasis added).

[42] *Second Report and Order,* 72 FCC Rcd 59, ¶ 15; *see also American Cablesystems of Florida, Ltd. v. Florida Power & Light Co.*, PA 9-0012, 10 FCC Rcd at 10934, 10935, ¶ 10 (*rel.* June 15, 1995).

[43] *Notice,* 12 FCC Rcd 7449 (1997) at ¶ 5. We proposed a re-evaluation of the current formula methodology to improve the accuracy in the continued application of the formula to cable television systems and to telecommunications carriers pursuant to the 1996 Act.

the *Cable Formula*.[44] We did not specifically raise the issue of forward looking costs in the *Notice* in this proceeding. However, in response to the *Notice*, American Electric submitted comments supporting a methodology for determining a just and reasonable rate for pole attachments which employs forward looking economic cost pricing.[45] Electric utility pole owners assert that such a methodology is necessary to appropriately compensate them for pole attachments made by telecommunications carriers. This position is vehemently opposed by most attaching entities. The utilities' argument is articulated in a report prepared by the Reed Consulting Group ("Reed Report"), submitted by American Electric, which argues that the Commission should take a new perspective on the *Cable Formula*. The Reed Report contends that the electric utilities do not possess market power; their facilities are not essential; they do not compete directly with cable or telecommunications companies; they do not enjoy unequal bargaining power; and they have no motivation to restrict access.[46] Based on these arguments, the Reed Report concludes that pole attachment rates should be set through market negotiation or in the alternative, using replacement rather than historical costs in the *Cable Formula*. In order to reach its conclusion, the Reed Report defines the relevant market to include wireless technology and underground cable as alternatives to pole attachments. NCTA responds that Congress did not choose to repeal or modify the use of historical costs in the *Cable Formula*; that no certified state calculates pole rates based on reproduction costs; that there are no viable alternatives for the placement of cable and telecommunications facilities; and that the utilities do compete with cable and telecommunications providers.[47]

9. The Commission has employed historical costs in *Cable Formula* calculations since the passage of the Pole Attachment Act in 1978.[48] Further, the United States Supreme Court has upheld the application of an historical cost methodology for determining pole attachment rates.[49] Thus, for two decades the *Cable Formula* has provided a stable and certain regulatory framework, that may be applied "simply and expeditiously" requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[50] Switching to a methodology based on forward-looking economic costs would

[44]*Notice*, 12 FCC Rcd at 7449 (1997), ¶ 1.

[45]*See* American Electric Comments at 14-95. American Electric was joined by other utility pole owners. *See, e.g.*, Duquesne Light Comments at 12-13; Edison Electric/UTC Comments at 14-15; Ohio Edison Comments at 12; Public Service of New Mexico Comments at 1.

[46]Reed Report at v.

[47]NCTA Reply at 12.

[48]*See First Report and Order*, 68 FCC Rcd 1585, ¶ 25; *aff'd, Second Report and Order*, 72 FCC 2d 59, ¶ 15; *see also Telecable of Piedmont, Inc. v. Duke Power Co.*, 10 FCC Rcd 10898 (1995).

[49]*FCC v. Florida Power Corporation*, 480 U.S. 245 (1987); *see also, Gulf Power v. USA*, 998 F. Supp. 1386 (N.D. Fla 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999).

[50]*See* 1977 *Senate Report* at 21 (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and

cause significant disruption and impose significant costs on attachers and this Commission. Such a change would require the Commission to develop a new formula that would necessitate a long and protracted rulemaking proceeding, and would likely involve complicated pricing investigations. In addition, such a change is likely to generate numerous complaints that the Commission would be required to resolve. Moreover, the Reed Report itself acknowledges that the use of a replacement cost methodology burdens regulators with a "long and tedious rate case process."[51] While we acknowledge that setting prices on the basis of forward-looking economic costs has significant advantages, including that it gives the appropriate signal for new entrants to invest in facilities, we believe these advantages are likely to be less pronounced in this context. We note that Congress has not expressed any intent for the Commission to deviate from the use of historical costs in the Cable Formula. We further note that the *Notice* did not specifically raise the possibility of shifting to a methodology based on forward-looking economic costs, and it therefore may not have been fully considered in the comments. Thus, we believe that in this particular context, after balancing all these factors, the disadvantages associated with changing to a methodology based on forward-looking economic costs would far outweigh any resulting benefits. For these reasons, we decline the electric utility pole owners' request to shift from the historical cost methodology at this time.

10. Based on all these factors, we will continue the use of historical costs in our pole attachment rate methodology. The continued use of a clear rate formula by the Commission is essential to encourage parties to negotiate for pole attachment rates, terms and conditions. We believe the continued use of historical costs accomplishes key objectives of assuring, to both the utility and the attaching parties, just and reasonable rates; establishes accountability for prior cost recoveries; and accords with generally accepted accounting principles.

2. Gross versus Net Book Costs

11. In the *Notice*, we sought comment on calculating pole attachment rates using gross book instead of net book costs. Currently, the *Cable Formula* incorporates net figures for the calculation of maximum pole attachment rates. Cable operators generally oppose a change to the use of gross book costs, contending that a) there are no regulatory or administrative efficiencies to be gained by moving to all gross book costs; b) net book costs would still be needed for return on investment computations; and c) the technical reasons offered by utilities in support of the use of gross book costs are not valid.[52] American Electric and other utility pole owners comment that the use of gross book costs are acceptable in the *Cable Formula* if the use of forward looking costs is not adopted by the Commission for pole attachment rates.[53]

---

procedures consistent with fair and efficient regulation").

[51]Reed Report at 20.

[52]*See, e.g.*, NCTA Comments at 24-25; Time Warner Comments at 24.

[53]*See, e.g.*, American Electric Comments at 70 (carrying charges for maintenance, depreciation, and administrative expense would be calculated based on gross book costs).

As we stated in the *Pole Attachment Order*, our preference is to use net figures.[54] The calculation of rate base items on a net basis is employed in the *Cable Formula* because that methodology reflects prior utility recovery of investment through depreciation, and prevents over-recovery of actual amounts invested.[55] We compute the carrying charge elements for maintenance, depreciation and administrative expenses, as well as for return on investment and taxes, using net book costs. For example, the net cost of a bare pole component is derived from the gross investment in poles less accumulated depreciation and accumulated deferred income taxes. The use of gross book costs in the *Cable Formula* would require that the carrying charge elements for maintenance, depreciation and administrative expenses be calculated using gross book costs for both total plant investment and pole investment. Even if gross book costs were used in the *Cable Formula*, the rate of return and the income tax carrying charges would continue to be computed using net book costs because utility prices are generally set to allow an authorized rate of return on net book costs. The use of gross book costs on a case by case basis does not appear to be inconsistent with the legislative history of Section 224, which indicates that the Commission has significant discretion in selecting a methodology for determining just and reasonable pole attachment rates.[56] In the past, if parties submitted calculations using gross book figures, we have calculated the maximum pole attachment rate using gross book costs.[57] The important goal is to ensure that like figures are used, whether net or gross and the Commission has stated that if both parties to a pole attachment complaint agree, the pole attachment rates may be computed using gross book costs.[58] We are not persuaded that our current preference for the use of net figures should be abandoned. Therefore, we will continue to use net figures in the *Cable Formula.* However, as in the past, when all parties to a complaint agree, we will allow the use of gross book costs.

---

[54] 2 FCC Rcd 4387 at n. 21 (1987).

[55] *See, 1977 Senate Report*; *First Report and Order*, 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979); *Third Order,* 77 FCC 2d 187 (1980); *see also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachment formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

[56] *1977 Senate Report* at 9. *See, e.g.,* Bell Atlantic/NYNEX Comments at 3-4; Duquesne Light Comments at 13; Edison Electric/UTC Comments at 42-44; GTE Comments 4-8, Reply 5-6; SBC Comments at 2-6; Sprint Comments at 8-9; USTA Comments at 4-11, Reply at 6-8; *see also* American Electric Comments at 70-71 (do not object if at pole owner's discretion). *But see* AT&T Reply at 13-15; Association of Local Telecommunications Services Comments at 13-17; MCI Comments at 20; NCTA Comments at 24-25; Time Warner Comments at 24, Reply at 8-9; WorldCom Reply at 9-10.

[57] *See, e.g., Capital Cities Cable, Inc. v. Southwestern Public Service Co.*, Mimeo No. 5431 (June 28, 1985); *Booth American Co. v. Duke Power Co.*, Mimeo 3064 (Com. Car. Bur., Mar. 22, 1984); *Teleprompter of Greenwood, Inc. v. Duke Power Co.*, Mimeo 001866 (Com. Car. Bur., July 6, 1981).

[58] *See, e.g., TeleCable of Piedmont, Inc.,* 10 FCC Rcd 10898 (1995).

IV. ARMIS Uniform System of Accounts for LEC Pole Owners

12. In the *Notice*,[59] we proposed a formal revision of the *Cable Formula* for LECs so that it accurately reflects our current use of data from the Commission's Automated Reporting Management Information System ("ARMIS").[60] ARMIS Report 43-02 - Uniform System of Accounts ("USOA") contains the financial operating results of a LEC's telecommunications operations for every Part 32 account.[61] The *Cable Formula* codified by the *Pole Attachment Order* specifies particular Part 31 accounts to be used to calculate the pole attachment rates LECs may charge cable systems.[62] Previously LECs reported data collected in Part 31 accounts on an FCC Form M.[63] Effective January 1, 1988, Part 31 was replaced by Part 32, which changed how LECs account for and report certain costs.[64] For example, it appeared that the Part 31 accounts used in the *Cable Formula* included some non-administrative expenses in the administrative component of the carrying charges.[65] The proposed Part 32 accounts used in the *Cable Formula* would not include such non-administrative expense in the administrative component. The potential for inclusion of unrelated expenses in certain accounts must be balanced with the inability to recover other minor expenses that may have a legitimate nexus to pole attachments that are included in unrelated accounts. Our policy has been that not every detail of pole attachment cost must be accounted

[59] *Notice*, 12 FCC Rcd at 7449 (1997), ¶ 30.

[60] *Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules)*, CC Docket No. 86-182, 2 FCC Rcd 5770 (1987), modified on recon., 3 FCC Rcd 6375 (1988) *(rel.* Oct. 14, 1988*) (ARMIS Order)*.

[61] ARMIS 43-02 USOA Report consists of three series of tables containing income statement, balance sheet, and general corporate data. This report, filed on an operating company basis, collects the operating results of the LEC's total activities for every account in the USOA, as specified in Part 32 of the Commission's rules. *See* 47 C.F.R. Part 32. ARMIS is available on the Commission's Internet web site at *http://www.fcc.gov/ccb/armis/*. The ARMIS database allows users to custom select data by report, year, company, study area, or individual data items. Data are available for years 1990 through 1997 and is updated regularly. The Internet availability and subsequent use of this information are expected to expedite calculations the of pole attachment formula.

[62] *Pole Attachment Order*, 2 FCC Rcd at 4387, 4403, Appendix B (1987).

[63] *Pole Attachment Order*, 2 FCC Rcd 4387 (1987); *see also* 47 C.F.R. § 1.1401-1.1416.

[64] *Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, 43 of the FCC's Rules), Report and Order*, 51 Fed. Reg. 24745 (July 8, 1986) and 51 Fed. Reg. 43493 (December 2, 1986) *("New USOA - Part 32 Adoption"); recon. in part, Memorandum Opinion and Order*, 2 FCC Rcd 1086 (rel. February 18, 1987).

[65] The Commission's Common Carrier Bureau has provided guidance to telephone companies and cable systems on applying the formula using Part 32 accounts. Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (Com. Car. Bur., June 22, 1990) ("*Part 32 Guidance Letter*").

for, nor every detail of non-pole attachment cost eliminated from every account used.[66] The adoption of Part 32 would not alter our policy in that regard.

13. There was no opposition in the record, and substantial encouragement,[67] to the codification of the use in the *Cable Formula* of Part 32 accounts reported to the ARMIS. Adoption of Part 32 accounts will facilitate public access to data on which to determine just and reasonable pole attachment rates.[68] We affirm the use of Part 32 Uniform System of Accounts for LECs, as reported to ARMIS, in determining various components of the *Cable Formula*. These specific accounts are discussed in this *Order* relating to various aspects of the *Cable Formula*.

V. FORMULA FOR DETERMINING ATTACHMENT RATES FOR POLES

14. The Commission uses the following *Cable Formula* in disputed cases to set rates to be charged by utilities for attachments on poles:[69]

$$\text{Maximum Rate} = \frac{\text{Space Occupied}}{\text{Total Usable Space}} \times \text{Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

15. In the *Notice*, we sought comment on the continued applicability of various factors and elements within this formula.[70] In *Implementation of Section 703(e) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking* ("*Telecommunications Notice*"),[71] we also sought comment regarding whether wind and weight load factors should be considered in the pole attachment rate and deferred discussion and decision on that issue to this rulemaking.[72]

A. Percentage of Total Usable Space Occupied

1. Background

[66] *See American Cablesystems of Florida, Ltd.*, 10 FCC Rcd 10934 (1995).

[67] *See, e.g.*, Bell Atlantic/NYNEX Comments at 5; BellSouth Comments at 5-6; NCTA Comments at 29 (but still object to paying for utilities' strategic planning, etc.); SBC Comments at 22; USTA Comments at 16.

[68] *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990).

[69] *Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 6; 47 U.S.C. §§ 224(b)(1), (d).

[70] *Notice*, 12 FCC Rcd at 7449, ¶¶ 17-37.

[71] 12 FCC Rcd 11725 at ¶ 18 (1997).

[72] *Telecommunications Report and Order*, 13 FCC Rcd 6777 (1998) at ¶ 25.

16. In the *Second Report and Order*, consistent with Section 224(d)(2) and Congressional intent, the Commission defined total usable space as the space on the utility pole above the minimum grade level that is usable for the attachment of wires, cables, and related equipment.[73] Based upon survey results, consideration of the National Electric Safety Code ("*NESC*"),[74] and practical engineering standards used in constructing utility poles, the Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."[75] In the *Third Order*, the Commission relied on *NESC* guidelines and data received in its rulemaking proceedings to affirm the presumption of an average 18 feet for minimum ground clearance, referring to Congressional findings that " . . . the typical utility pole [is] 35 feet in length [and] has 11 feet of usable space leaving a total of 24 feet for both the portion buried underground [6 feet] and the necessary ground clearance [18 feet].[76] To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of (1) an average 37.5 foot pole height; (2) 13.5 feet of usable space; and (3) one foot as the amount of space a cable television attachment occupies.[77] These presumptions serve as the premise for calculating pole attachment rates under the current formula.

17. In anticipation of the *Notice*, a group of electric utilities filed a white paper ("*White Paper*"),[78] intended to facilitate the exchange of ideas among parties interested in matters related to pole and conduit attachments.[79] The *White Paper* asserts that over time and with increased demand for pole space the average pole height has increased to 40 feet, and that the usable space presumption should be

[73] *See* 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

[74] The National Electrical Safety Code® ("*NESC*"), published by the Institute of Electrical and Electronics Engineers, Inc. ("IEEI") adopts certain standards that cover basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of (1) conductors and equipment in electric supply stations, and (2) overhead and underground electric supply and communication lines. *NESC*, 1997 Edition (published August 1, 1996) Abstract and § 1, p. 1. The *NESC* is a voluntary standard; however, some editions and some parts have been adopted, with or without changes, by some state and local jurisdictional authorities. *NESC*, p. vi.

[75] 72 FCC 2d at 69.

[76] *Third Order*, 77 FCC 2d 187 n.8 (1980) (referencing the *1977 Senate Report* at 20); *see also Second Report and Order*, 72 FCC 2d at 68 n.21.

[77] 72 FCC 2d at 69-70. In the *Telecommunications Report and Order*, we affirmed the one foot presumption for attachments made by telecommunications carriers. 13 FCC Rcd 6777 (1998) at ¶ 91.

[78] *See White Paper* filed by the law firm of McDermott, Will and Emery on August 28, 1996, on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

[79] American Electric Reply at 2.

reduced from 13.5 feet to 11 feet.[80] In 1984, the Commission, in an order denying a petition filed by some of the utilities now sponsoring the *White Paper*, *Petition to Adopt Rules Concerning Usable Space on Utility Poles*, FCC 84-325 (*"Usable Space Order"*)[81] rejected the same arguments for changing the usable space presumptions as they again put forward.

18. In the *Notice*, we sought comment on the 37.5 foot presumptive pole height, the 13.5 foot usable space presumption, the average 18 foot minimum ground clearance, the allocation of the 40-inch safety space to usable space, the exclusion of 30 foot poles from the calculation of costs of a bare pole and whether 30 foot poles lack a sufficient amount of usable space to accommodate multiple attachments.[82]

2. Discussion

19. The presumptions used in the *Cable Formula* have been repeatedly affirmed since the enactment of the Pole Attachment Act.[83] We again decline to modify the well established presumptions leading to 7.4% as the percentage of usable space occupied by a pole attachment.[84] Commenters are divided on this issue, with pole owners asserting they should be entitled to higher rates[85] that would result from their desired presumption changes, and attaching entities quoting Congressional intent, Commission precedent and widespread industry practice to counter the arguments.[86] We are not persuaded by specific current industry data from electric utilities to change the usable space presumptions.

---

[80] *White Paper* at 11.

[81] Unpublished Order *(rel.* July 25, 1984).

[82] *Notice* at ¶¶ 18-20.

[83] *First Report and Order*, 72 FCC 2d 59; *Second Report and Order*, 77 FCC 2d 187, 191-193; *Cable Information Services, Inc. v. Appalachian Power Co.*, 81 FCC 2d 383 (1980); *Television Cable Service, Inc. v. Monongahela Power Co.*, 88 FCC 2d 56 (D.C. Cir. 1981).

[84] The ratio of space occupied (presumptive 1 foot) over usable space (presumptive 13.5 feet) results in a factor of 0.074 for use in calculations of the *Cable Formula*.

[85] *See, e.g.,* American Electric Comments at 48; Carolina Power Comments at 74; Edison Electric/UTC Comments at 34; Ohio Edison Comments at 11; Union Electric Comments at 20.

[86] *See, e.g.,* Association for Local Telecommunications Services Comments at 5; Ameritech Comments at 3; AT&T Comments at 17; MCI Comments at 5; WorldCom Reply at 12. *Cf.* NCTA Comments at 9-15 (actual average pole height is increasing, but there is no basis for reducing the 13.5 feet usable space presumption in the pole formula).

a. Safety Space

20. A 40-inch safety space was created to minimize the likelihood of physical contact between employees working on cable television or telephone lines and the potentially lethal voltage carried by the electric lines, as well as to prevent electrical contact between such cables.[87] In the *Second Report and Order*,[88] and the *Third Order*,[89] the Commission rejected the arguments of electric companies that the entire 40 inches of safety space should be attributable to cable television operators. In the *Notice*,[90] we sought comment on the continued validity of the allocation of the 40-inch safety space to usable space. After consideration of the evidence in this proceeding, we decline to decrease the amount of usable space from 13.5 feet to 11 feet by reallocating the 40-inch safety space as unusable space. Removing the 40-inch safety space from usable space, under Section 224(d), would have the effect of spreading the costs of the safety space among the utility pole owner and the attaching entity.[91]

21. Some electric utilities request that we remove the 40-inch safety space from the presumptive 13.5 feet of usable space because the safety space exists to protect attaching entities' workers when installing and maintaining their pole attachments.[92] Attaching entities assert that any cable operator or telecommunications carrier seeking to install a pole attachment is already required to incur "make-ready" expenses to ensure the existence of the 40-inch safety space, and that electric utilities benefit from the safety space by attaching their own facilities such as communications equipment, street lights, transformers, and grounded, shielded power conductors in the safety space.[93]

22. It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers.[94] The space is usable and is used by the electric utilities. A bare pole, when erected has portions

[87] *See, Second Report and Order*, 72 FCC 2d 59, 69-70 (*citing NESC* at Appendix C, at 163, Table 235-5 (1977 ed.) at n. 25.

[88] *Id.*

[89] 77 FCC 2d 187 (1980).

[90] 12 FCC Rcd 7449 (1997) at ¶ 19.

[91] 47 U.S.C. § 224(d)(1), (2).

[92] *See, e.g.,* American Electric Comments at 51; Carolina Power Comments at 33; Duquesne Light Comments at 20; Edison Electric/UTC Comments at 30; Public Service of New Mexico Comments at 6; Union Electric Comments at 21.

[93] *See, e.g.,* Time Warner Comments at 15; USTA Comments at 23; *see also Second Report and Order*, 72 FCC 2d at 71.

[94] *See, e.g.,* NCTA Comments at 12; TCI Comments at 14; Time Warner Comments at 15, U S West Comments

to which attachments cannot be made at any time—the ground clearance and the part of the pole below ground. The rest is available for attachments; it is usable space. A communications attachment, even though it may be a fiber optic cable with a diameter of only one inch, is presumed to occupy one foot of the attachable space because of separation requirements. In a like manner, the electric supply cable on the pole, because of its unique spacing requirements must be 40 inches away from communications attachments. No one questions that the eleven inches of space not physically occupied by a fiber optic cable, but attributed to it, is usable space. Because the electric supply cable precludes other attachments from occupying the safety space, which would otherwise be usable space, the safety space is effectively usable space occupied by the supply cable. So long as their crews make the installation, the electric utilities are not limited by the *NESC* in what equipment or cables they may attach in the safety space. Accordingly, we reject the electric utilities' arguments to reduce the presumptive usable space of 13.5 feet by 40 inches.

b. Minimum Ground Clearance

23. In the *Second Report and Order*, the Commission established that a presumptive average 18 feet of the pole space is reserved for ground clearance.[95] The 18 foot presumption is not dictated by the National Electric Safety Code ("NESC"),[96] but is an average to be used in the estimation of total usable space.[97] In the *Usable Space Order*, we determined that the selection of the 18 foot figure reflected various elements such as differing pole heights, as well as NESC standards that vary depending on the physical environment of the pole.[98] Factors used to determine the NESC standard of minimum ground clearance, include whether the wires or cables cross over railroad tracks, roads, or driveways and the amount of voltage transferred through the cables.[99] In response to the *Notice,* some electric utilities suggest that the lowest attachment on a pole must be at least 19'8" from the ground in order to accommodate

---

at 5. *But see*, Sprint Comments at 4 (since all attaching parties are required to comply with the *NESC*, the space should be regarded as unusable).

[95]72 FCC 2d 59, 69-70 (1979); National Electric Safety Code ("*NESC*") Appendix C, Table 235-5, p. 163 (1977 ed.); MCI Comments at 10.

[96]*NESC* Rule 232, Vertical Clearances of Wires, Conductors, Cables, and Equipment Above Ground, Roadway, Rail, or Water Surfaces provides narrative and table references for various clearances [clearance is defined as the clear distance between two objects measured surface to surface (*NESC*, § 2, at p. 5)] under a variety of circumstances, involving a variety of types of electric and communications equipment, and in a variety of environments.

[97]*See* MCI Comments at 10.

[98]*Usable Space Order*, slip op. at ¶ 11.

[99]*NESC* at 77, Table 232-1 (1997 Edition).

communications cable sag.[100] The electric utilities provide us with "average" sag for a "typical" communications cable, but do not indicate how either was determined.[101] In the *Usable Space Order* we carefully considered numerous studies submitted to us before concluding that the 18 foot figure was an appropriate tool to estimate usable space.[102] The data provided by the utilities regarding sag does not demonstrate the same rigor as the studies on which our *Usable Space Order* was based.[103]

24. The rebuttable nature of the usable space presumption allows for the use of a different minimum ground clearance when necessary to improve the accuracy of the calculations.[104] Presumptions were adopted to encourage expeditious response to complaint information requests.[105] We have not been persuaded that a departure from our well established presumption of an average minimum ground clearance of 18 feet is warranted.[106]

c. 30 Foot Poles

25. In the *Notice*, we sought comment on whether 30 foot poles lack a sufficient amount of usable space to accommodate multiple attachments and whether including poles of 30 feet or less in the total number of poles for calculating the *Cable Formula* results in a distorted rate.[107] The *White Paper* contends that poles of 30 feet or less lack a sufficient amount of usable space to accommodate multiple attachments, and suggests that the inclusion of these poles in the calculation results in an inexact

[100] *See, e.g.*, American Electric Comments at 48-50.

[101] *See, e.g.*, American Electric Comments at 48-50.

[102] *Usable Space Order*, slip op. at ¶ 12.

[103] Section 1.1404(g)(11) states that 13.5 feet may be used in lieu of actual measurement as the amount of usable space, but that it may be rebutted. 47 C.F.R. § 1.1404(g)(11). We have stated that a survey that yields a statistically reliable result would be acceptable. *See Second Report and Order* at ¶ 21. Such a survey must meet the requirements of Section 1.363 of the Commission's Rules. 47 C.F.R. § 1.363.

[104] *See NESC* (1997 edition), Forward at vi.; *see also* Ohio Edison Comments at 21-22 (arguing that the Commission's rules should expressly allow a utility to use a different average of usable space for its rate calculations than the Commission's rebuttable presumption if state law requires a minimum ground clearance at the pole of more than 18 feet).

[105] *1977 Senate Report* at 21.

[106] *See, e.g.*, Ameritech Comments at 3; AT&T Comments at 17; Bell Atlantic/NYNEX Comments at 11; NCTA Reply at 37-38.

[107] *Notice* at ¶ 20.

determination of the actual net costs of a bare pole.[108]

26. We have not been presented with evidence that a pole attachment rate based on pole inventory, in which 30 foot poles are included, fails to adequately compensate a pole owner. We have received significant information to the contrary.[109] Telecommunications carriers disagree with the utilities' argument to exclude 30 foot poles from the bare pole calculation.[110] The record confirms the prevalent use of 30 foot poles and reflects that exclusion of such poles from the *Cable Formula* calculations could distort the resulting rate by excluding a significant portion of LEC plant investment from the rate calculation.[111] With a presumed ground clearance of 18 feet, a 30 foot pole has six feet of usable space. A 30 foot electric utility pole can accommodate two communications attachments or more with overlashing. A 30 foot LEC pole can accommodate more.[112] We conclude that a distorted inventory of poles would be reflected if utilities were allowed to "opt out" or exclude their poles of 30 feet or less when calculating their pole attachment rates.[113]

d. Weight and Wind Load Factors

27. In the *Telecommunications Notice* we sought comment on an issue raised by Duquesne Light in its Petition for Reconsideration ("*Duquesne Petition*") of the Commission's decision in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 ("Local Competition Order").*[114] The *Duquesne Petition*

[108] *White Paper* at 12-13.

[109] *See, e.g.,* NCTA Comments at 15-18 (LECs use significant numbers of 30-foot poles); Sprint Comments at 4-5 (still use many 30 foot poles); USTA Comments at 27-29 (LECs use substantial numbers of 30-foot poles); U S West Comments at 4 (over 13% of inventory is 30 feet or less). *Cf.* American Electric Comments at 55-57; Carolina Power Comments at 29; Edison Electric/UTC Comments at 29 (Electric utilities do not use many 30-foot poles and do not account for them separately).

[110] Ameritech Comments at 4; AT&T Comments at 10; Bell Atlantic/ NYNEX Comments at 10; GTE Comments at 13; MCI Comments at 12; SBC Reply at 39; Sprint Comments at 4; USTA Comments at 27.

[111] *See, e.g.,* GTE Reply at 13; NCTA Comments at 12-16, Reply at 21-22; Ohio Edison Comments at 26; SBC Comments at 38-39; TCI Comments at 13; Time Warner Comments at 11-13, 18-19; U S West Comments at 4.

[112] *See, e.g.,* Ameritech Comments at 4; AT&T Comments at 18; NCTA Comments at 4-5, Reply at 21-24.

[113] *See, e.g.,* Ameritech Comments at 4; AT&T Comments at 10; Bell/NYNEX Comments at 10; GTE Comments at 13; MCI Comments at 14; NCTA Comments at 15; Public Service of New Mexico Comments at 6; SBC Reply at 39; Sprint Comments at 5; TCI Comments at 13; Time Warner Comments at 12-13; USTA Comments at 28-29; U S West Comments at 4.

[114] *Telecommunications Notice*, 12 FCC Rcd at 11725, ¶ 18 (citing *Local Competition Order*, FCC 96-325, 11 FCC Rcd 15499 at 16058-107, ¶¶ 1119-1240 (1996)); *see also* Duquesne Light CC Docket No. 96-98 Comments

requests that the Commission recognize, and incorporate into its rate formula, that various attachments place difference burdens on the poles. Duquesne Light asserts that presumptions used in the *Cable Formula* should include factors addressing weight and wind loads.[115] For instance, Duquesne Light claims that overlashing of an attachment will increase the loading on the pole, especially during adverse icy and windy weather conditions. Duquesne Light maintains that an increase in loading could cause a pole to lean, lines to sag or the pole to break or collapse. This increase in loading, Duquesne Light argues, necessitates the charging of an additional fee for the overlashed cable, as well as treatment of the overlash as a separate attachment.[116] In the *Telecommunications Report and Order*, we reserved decision on the weight and wind load issues until the resolution of the rulemaking currently before us.[117] We will therefore address at this time whether any presumptions should reflect these factors.

28. Consideration of loading, including weight and wind load, relates to engineering of the pole structure. Sections 24 through 26 of the NESC address considerations of loading and structural requirements in detail.[118] We do not believe that an attachment "burden on the pole" relates to anything other than an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. Make-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation.[119] We agree with USTA that the statutory language for allocating costs in Section 224 refers to space, not load capacity.[120]

29. We are not convinced that "burden on the pole" due to weight and wind load is an additional factor for consideration in the determination of the amount of space occupied.[121] Wind and weight loading factors, as calculated using NESC rules,[122] increase as the cross-sectional area of the wire

---

at 17-18.

[115]Duquesne Light CC Docket No. 96-98 Comments at 17-18; Duquesne Light CS Docket No. 97-151 Comments at 36.

[116]Duquesne Light CS Docket No. 97-151 Comments at 26-28.

[117]*Telecommunications Report and Order*, 12 FCC Rcd at 11725, ¶ 5.

[118]*NESC* at 142-168, Sections 24-26.

[119]*See Second Report and Order,* 72 FCC 2d 59, at ¶ 7.

[120]47 U.S.C. § 224(d); *see also, e.g.,* USTA Reply at 13-14.

[121]For discussion of applicability of the one foot presumption for cable operators, see ¶¶ 28, 35 of this *Order; see also, Telecommunications Report and Order,* 13 FCC Rcd 677 at ¶¶ 80-92 for applicability to telecommunications carriers.

[122]*NESC* Rule at 148 (1997 Edition).

increases. The NESC calculations use the worst case scenario where the wind is blowing parallel to the ground and perpendicular to the side of the cable, wire, conductor, etc., creating maximum wind resistance. The surface area presented to the wind is directly proportional to the diameter or vertical dimension of the wire, conductor, cable, etc.[123] As the vertical dimension increases, and therefore, the surface area increases, the wind load factor increases. It is the vertical dimension of the wire that determines how much space is occupied on the pole. The current method for allotting space to a pole attachment, therefore, accounts directly for the wind load factor. The weight load factor is considered when deciding whether a stronger pole is necessary as part of make-ready work.

30. Further, the inclusion of factors such as wind and weight load in the presumptions could lead to unacceptable over-recovery. Many of the factors have already been included in accounts in the maintenance element of the carrying charge rate. For electric utility owned poles, FERC Account 593 includes pole related expenses for overhead lines and allows for the recovery of the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution facilities. This account includes expenses for repair pole related equipment and adjusting the sag of attachments to the pole.[124] The Commission's ARMIS rules for LEC accounting provide for the recovery of damages and pole related expenses caused by storms or other casualties.[125] The complete costs of the physical attachments of an attaching entity are normally paid to the pole line owner as a condition of attachment, addressing such factors as weight, wind load and safety space.[126] These make-ready costs have been fully recovered. It would be inappropriate to allow for their recovery again through the pole rate.

B. Cost of a Bare Pole

31. In the *Pole Attachment Order,* the Commission promulgated a methodology to arrive at the net cost of a bare pole for use in the *Cable Formula*[127] from a calculation of the total investment in poles less accumulated depreciation for poles, and less accumulated deferred income taxes.[128] An

[123]The surface of the cable presented the wind is approximately a rectangle with a length equal to the distance between the poles(l) and a height equal to the half the cumulative circumferences of the wires (in the worse case) ($\frac{1}{2}\pi d_1+\frac{1}{2}\pi d_2+\frac{1}{2}\pi d_3+ \ldots$). The surface area is then l X $\frac{1}{2}\pi(d_1+d_2+d_3)$ when a cable is overlashed with another cable above and one below and it increases proportionately as the cumulative diameter increases.

[124]*See* 18 C.F.R. Part 101 (Uniform Systems of Accounts Prescribed for Public Utilities And Licensees Subject to the Provisions of the Federal Power Act) Account 593.

[125]47 C.F.R. §§ 32.5999(b)(3), 32.6410, 32.6411.

[126]*See, e.g.,* NCTA Comments at 15-16; Summit CS Docket No. 97-151 Comments at 1.

[127]*See Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶¶ 10-19 & Appendix B. The *Pole Attachment Order*, used the term "depreciation reserve" in this formula. We have updated our terminology to reflect Generally Acceptable Accounting Principles (GAAP) and use the term "accumulated depreciation."

[128]*Pole Attachment Order*, 2 FCC Rcd 4287, at ¶¶ 10-19 & Appendix B.

adjustment to a utility's net pole investment (of 15% for electric utilities and 5% for LECs) is necessary to eliminate the investment in crossarms and other non-pole related items.[129]

1. LEC Pole Owner Formula Methodology

32. The *Pole Attachment Order* prescribed a formula for determining the net cost of a LEC's bare pole, using the old Form M, Part 31 Account 241 (Gross Pole Investment), as follows:[130]

$$\text{Net Cost of a Bare Pole} = \frac{\text{Gross Pole Investment (Account 241)} - \text{Depreciation Reserve (Poles)} - \text{Accumulated Deferred Income Taxes (Poles)} - \text{0.05 of Net Pole Investment}}{\text{Total Number of Poles}}$$

33. In the *Notice*, we proposed a revised formula to determine a value for the net cost of a bare pole using the ARMIS Part 32 Account 2411 (Gross Pole Investment) for LEC pole owners, applying the 5% (or 0.95) adjustment factor.[131] Based on the record, we affirm our proposed formula to determine the net cost of a bare pole for LEC pole owners under the following formula:[132]

$$\text{Net Cost of a Bare Pole (LEC)} = 0.95 \times \frac{\text{Account 2411} - \text{Accumulated Depreciation (Account 3100)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 4100+4340)(Poles)}}{\text{Number of Poles}}$$

34. In this formula Accumulated Depreciation (Poles) and Accumulated Deferred Income Taxes (Poles) are derived from composite Part 32 accounts attributable to poles. Specifically, Accumulated Depreciation (Poles) represents the share of Part 32 Account 3100 (Accumulated Depreciation) that corresponds to Account 2411, and Accumulated Deferred Income Taxes (Poles) represents the shares of Part 32 Accounts 4100 (Net Current Deferred Operating Income Taxes) and 4340

[129] *See Pole Attachment Order*, 2 FCC Rcd at 4387, 4390, (1987) at ¶ 19. The two factors reflect the differences between LECs' and electric utilities' investment in crossarms and other non-pole investment that is recorded in the pole accounts. Electric utilities typically have more investment in crossarms than LECs. The 0.85 factor for electric utilities recognizes this difference. These adjustment factors are rebuttable. *See also, Notice* at ¶ 42.

[130] *Pole Attachment Order,* 2 FCC Rcd 4287, Appendix B. FCC Form M Part 31 Accounts 171 [Depreciation Reserve] and 176.1 [Deferred Income Taxes (Accumulated)] were composite accounts that were required to be maintained on a subsidiary basis, and therefore apportionment of these accounts were necessary to determine pole rates. In other words, Depreciation Reserve (Poles) represented the share of FCC Form M Part 31 Account 171 that corresponded to Account 241 (Gross Pole Investment), and Accumulated Deferred Income Taxes (Poles) represented the share of FCC Form M Part 31 Account 176.1 that corresponded to Account 241.

[131] *Notice* at ¶ 42.

[132] *Notice* at Appendix A.

(Net Noncurrent Deferred Operating Income Taxes) that correspond to Account 2411.[133]

35. The formula, as adopted, updates the *Cable Formula* to reflect current regulatory accounting practices by LECs, and clarifies the method for accurately deriving the proper figure for accumulated deferred income taxes when used in conjunction with the pole attachment formula.[134] This formula updates the *Cable Formula* in a manner that is equitable to all parties by providing consistency in calculating a pole attachment rate based on publicly available and verifiable data.[135] The adjustment to the *Cable Formula* also recognizes more accurately the accumulated deferred taxes related to pole investment than would proration based upon a ratio of pole investment to total plant in service.

2. Electric Utility Pole Owner Formula Methodology

36. The *Pole Attachment Order* prescribed a formula for determining the net cost of a bare pole for electric utilities using FERC Accounts[136] as follows:[137]

$$\text{Net Cost of a Bare Pole} = \frac{\text{Account 364 (Gross Pole Investment)} - \text{Depreciation Reserve (Poles)} - \text{Accumulated Deferred Income Taxes (Poles)} - \text{0.15 of Net Pole Investment}}{\text{Number of Poles}}$$

37. In the *Notice*,[138] we stated the formula includes factors appropriate for arriving at the net cost of a bare pole for electric utility pole owners. In response to the *Notice,* some electric utilities assert that FERC Accounts 365 (Overhead Conductors and Devices) and 368 (Line Transformers) should be included in the calculations to determine the net cost of a bare pole.[139]

---

[133]*Part 32 Guidance Letter,* 5 FCC Rcd 3898 (1990). For Account 3100, *see* ARMIS Report 43-02, row 0390. The subsidiary accounts for Accounts 4100 and 4340 are required to be maintained and reported to the Commission. *See* 47 C.F.R. §§ 43.21, 43.43, 32.4100 and 32.4340. *See also*, Biennial Regulatory Review, Review of Accounting and Cost Allocation Requirements, FCC 99-106 at ¶ 15 (*rel.* June 30, 1999) and Biennial Regulatory Review, Review of ARMIS Reporting Requirements, FCC 99-107 at ¶ 13 (*rel.* June 30, 1999).

[134]*See* USTA Comments at 18. *Cf.* NCTA Reply at 34.

[135]*Pole Attachment Order*, 2 FCC Rcd 4387 (1987); *1977 Senate Report* at 19-20.

[136]FERC Account 364 is "poles, towers and fixtures." 18 C.F.R. Part 101, Description of Accounts.

[137]*Pole Attachment Order*, 2 FCC Rcd 4387, 4402-03, Attachment B (1987).

[138]*Notice* at ¶ 10.

[139]*Notice*, 12 FCC Rcd at 7449, ¶ 18. *See, e.g.,* American Electric Comments at 58-67; Carolina Power Comments at 43-58; Edison Electric/UTC Comments at 37-41.

38. We decline to add portions of Accounts 365 or 368 to the net cost of a bare pole factor. This factor already contains adjustment components, relating to appurtenances such as crossarms, that can be challenged with appropriate verifiable data.[140] We affirm our conclusion that lightning protectors and grounding installations recorded in accounts other than Account 364 should not be included in the calculation of the net cost of a bare pole factor.[141] Attaching entities are required to provide separate grounding for their own attachments.[142] Lightning protectors and grounding installed on poles by utilities are equipment specific to the electric utility's core business services and not related to the general cost of the pole plant. Portions of Accounts 365 and 369 are already included in the maintenance element of the relevant *Cable Formula.*[143]

39. We do not believe that portions of Accounts 580 (Operation: Supervision and Engineering) and 583 (Operation Overhead Line Expenses, Major Utilities Only) should be included even if they contain some capital expense incurred with respect to all electric power distribution plant.[144] Based on the record, we believe that any increased accuracy that would be derived from including some minute percentage of pole-related expenses that may be recorded in miscellaneous accounts, is outweighed by the complexity of arriving at an appropriate and equitable percentage of the expenses.[145] The descriptions of what expenses are to be reported in Accounts 365, 368,[146] 580 and 583, contained in FERC Part 101,[147]

[140] *See Pole Attachment Order,* 2 FCC Rcd 4387, 4390 (1987), ¶ 19 (appurtenance ratios (5% for telephone and 15% for electric utilities) [are] rebuttable presumptions to be used in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances); *see also, e.g.,* AT&T Reply at 24-28; NCTA Comments at 19-21, Reply at 26.

[141] *Notice* at ¶ 18.

[142] *See, e.g.,* NCTA Comments at 19-20, NCTA Ex Parte Presentation March 12, 1998. *But see,* American Electric Comments at 58-67; Carolina Power Comments at 50-52; Electric Edison/UTC Comments at 37-41.

[143] *Pole Attachment Order,* 2 FCC Rcd 4387, 4402-03, Attachment B (1987); *see also* discussion of the maintenance element at Section V.C.2 of this *Order.*

[144] *See, e.g.,* Carolina Power Comments at 50-52.

[145] *See, e.g.,* MCI Reply at 31-33; NCTA Comments at 21 (if the Commission were to consider the addition of grounding systems into the rate formula, that inclusion would have to be spread across the utility investment in its entire distribution network), Reply at 26; Time Warner Comments at 19-22; *see also, Hearing Designation Order, American Cablesystems of Florida, LTD. v. Florida Power and Light Company,* PA 91-0012, CC Docket No. 95-95, 10 FCC Rcd 10934 at ¶ 10 (June 15, 1995); *Hearing Designation Order, TCA Management Co., et al., v. Southwestern Public Service Company,* PA 90-0002, CC Docket No. 95-84, 10 FCC Rcd 11832 (June 15, 1995).

[146] *See, e.g.,* MCI Reply at 31-33; NCTA Reply at 26.

[147] *See,* 18 C.F.R. Part 101: descriptions of (FERC) accounts and operating expense reporting instructions.

appear to relate more directly to the electric utilities' core business operations rather than "actual capital costs attributable to the entire pole, duct, conduit or right-of-way," as required for inclusion in the rate formula.[148]

40. In keeping with long-standing Commission precedent,[149] expenses relating to grounding systems should be excluded from the rate base because, like cross-arms and appurtenances, they are part of the electric utilities' entire system of conductors, rather than of poles.[150] In addition, costs for such equipment are often included in make-ready expenses that attaching entities pay on an up-front, non-recurring basis.[151] We also agree with cable operators and telecommunications carriers that contend the adoption of the electric utilities' proposals would have the significant disadvantage of requiring the allocation of portions of FERC accounts into rate-base calculations, turning virtually every rate dispute into a full-blown, discovery-laden rate case.[152]

41. We affirm the following formula to determine the net cost of a bare pole for electric utilities:

$$\text{Net Cost of a Bare Pole (Electric)} = 0.85 \times \frac{\text{Account 364} - \text{Accumulated Depreciation (Poles)} - \text{Accumulated Deferred Income Taxes (Poles)}}{\text{Number of Poles}}$$

42. Under this formula, Accumulated Depreciation (Poles) represents the share of FERC Account 108 (Accumulated provision for depreciation of electric utility plant (Major only) a composite account that is required to be maintained on a subsidiary basis, that corresponds to Account 364 (Poles,

[148] 47 U.S.C. § 224(d)(1).

[149] *See, e.g., Williamsburg Cablevision v. Carolina Power and Light Co.*, PA 82-007, FCC Mimeo 1961 (Jan. 26, 1983); *American Television and Communications Corp. v. Wisconsin Power & Light Co.*, PA No. 82-006, Mimeo 1678 (Jan. 4, 1985).

[150] In the *Notice*, 12 FCC Rcd at 7449 n. 55, we suggested that the costs of grounding systems may be included in FERC accounts currently used to calculate electric utilities' pole attachment rates. Asset accounts 364, 365, and 369 are used to calculate the maintenance component of the carrying charge rate. However, Account 364, reduced by 15% to account for appurtenances, is used as the pole rate base (net cost of a bare pole). The *White Paper* suggests that the grounding and arrestor systems booked to Account 365 should be added to this rate base. For the reasons set forth in this section, we believe they should not be. *See* NCTA Comments at 21 (if the Commission were to consider the addition of grounding systems into the rate formula, that inclusion would have to be spread across the utility investment in its entire distribution network); *see also* MCI Reply at 31-33; NCTA Reply at 26; Time Warner Comments at 19-22.

[151] *See, e.g.,* MCI Reply at 31-33; NCTA Reply at 26.

[152] *See, e.g.,* MCI Reply at 31-33; NCTA Reply at 26; Time Warner Comments at 19-22.

Towers, and Fixtures).[153] Similarly, Accumulated Deferred Income Taxes represents the share of composite FERC Account 190 (Accumulated deferred income taxes) that corresponds to Account 364.[154]

3. Total Number of Poles

43. We have previously concluded that poles of 30 feet or less should be included in calculations of the *Cable Formula* in our discussion about pole height and the usable space presumption.[155] Based on our review of the record in this proceeding, we also conclude that poles of 30 feet or less should therefore be included in the inventory of the total number of poles owned or used, jointly-owned or solely-owned, by a utility. The exclusion of these poles would result in a distorted and inaccurate pole inventory resulting in an unjust and unreasonable pole attachment rate because they are being used by the utility for their business services and by cable operators and telecommunications carriers to provide their respective services.[156]

C. Carrying Charge Rate (Poles)

44. The carrying charge rate[157] reflects those costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments.[158] The elements of the carrying charge rate are: administrative, maintenance, depreciation, taxes and cost of capital (rate of return).[159] In the *Pole*

[153]18 C.F.R. Part 101, General Instructions.

[154]*Id.*

[155]*See* discussion at Section V.A.2.c of this *Order*.

[156]*See, e.g.*, NCTA Comments at 15; SBC Reply at 39; USTA Comments at 28-29; U S West Comments at 4; *Cf., e.g.*, American Electric Comments at 55-57; Carolina Power Comments at 29; Edison Electric/UTC Comments at 29; *see also, e.g.*, Duquesne Light Comments at 18 (cannot separate out 30 foot poles from total inventory of poles).

[157]The annual carrying charge rate attributable to the cost of owning a pole are required to be provided in a pole attachment complaint. These charges may be expressed as a percentage of the net pole investment. Accumulated deferred taxes are used in calculating the administrative, maintenance and taxes elements of the carrying charge rate. The utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes with its pleading, if accumulated deferred taxes are at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes. 47 C.F.R. § 1.1404(g)(9).

[158]*Notice* at ¶ 11.

[159]*Pole Attachment Order*, 2 FCC Rcd at 4387, 4391 (1987), ¶ 25.

Attachment Order,[160] the Commission identified the regulatory accounts to be used, where possible, in applying the *Cable Formula* to determine the maximum allowable rate for pole attachments. The carrying charge rate factor of the *Cable Formula* is calculated as follows:[161]

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

To calculate the carrying charge rate, the Commission developed a formula that relates each of these elements to a pole owner's net pole investment.[162] The full *Cable Formula*, with all its components, elements and accounts used, is attached to this *Order* as Appendix C.

45. In May 1986, the Commission adopted a new uniform system of accounts for all FCC regulated telephone companies.[163] The Commission's Annual Report Form M was revised on April 27, 1989[164] to reflect the new accounting system in Part 32 that replaced the accounting system in Part 31, effective January 1, 1988.[165] The *Pole Attachment Order* provided formulas for determining a maximum just and reasonable pole attachment rate with regulatory accounts identified.[166] The formula for LECs used Part 31 accounts. After the *New USOA-Part 32 Adoption*, the Common Carrier Bureau responded to a request for clarification of what Part 32 accounts would be used in place of the Part 31 accounts specified in the *Pole Attachment Order*. That guidance was given with the understanding that an exact tracking of expenses from Part 31 accounts to Part 32 accounts was not possible.[167] In this *Order*, we formalize and further clarify the Part 32 accounts to be used in the *Cable Formula* for LECs utilities. LECs maintain their Part 32 accounts and file their annual operating costs with the Commission's Automated Reporting and Management Information System ("ARMIS").[168]

---

[160] 2 FCC Rcd 4387, 4402-03, Attachment B (1987); *see also American Cablesystems of Florida, Ltd.*, 10 FCC Rcd 10934 (1995).

[161] *Notice*, 12 FCC Rcd at 7449, Appendix A.

[162] *Pole Attachment Order*, 2 FCC Rcd at 4387, 4402-03, Attachment B (1987).

[163] *New USOA - Part 32 Adoption*, 51 Fed. Reg. 24745 (1986) and 51 Fed. Reg. 43493 (1986); *recon. in part*, 2 FCC Rcd 1086 (1987).

[164] Common Carrier Bureau, DA 89-503 (*rel.*, May 22, 1989).

[165] *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990).

[166] 2 FCC Rcd 4387, 4402-03 (1987).

[167] *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990).

[168] *Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules)*, CC Docket No. 86-182, 2 FCC Rcd 5770 (1987), *modified on recon.*, 3 FCC Rcd 6375 (1988) *(rel.* Oct. 14, 1988) (*"ARMIS Order"*).

1. The Administrative Element

46. In the *Pole Attachment Order*, the Commission adopted procedures to identify and calculate administrative expenses, for use in the carrying charge rate as a ratio of total administrative and general expenses to total plant investment.[169] A formula for the administrative expenses[170] was given as follows:

$$\text{Administrative Expense} = \frac{\text{Administrative and General Expenses}}{\text{Gross Plant Investment} - \text{Depreciation Reserve} - \text{Accum. Deferred Taxes, Plant}}$$

47. In the *Notice*,[171] we proposed the following revised formula, using Part 32 accounts, for the administrative element for LECs:

$$\text{Administrative Element} = \frac{\text{Administrative and General (Accounts } 6710 + 6720 + 6110 + 6120 + 6534 + 6535)}{\text{Gross Plant Investment} - \text{Accumulated Depreciation (Account 3100)} - \text{Accum. Deferred Taxes, Plant (Accounts 4100 \& 4340)}}$$

48. The substantive changes to the administrative element proposed in the *Notice*, based primarily on the adoption of Part 32,[172] included the addition of Accounts 6710 (Executive and Planning), 6720 (General and Administrative), 6110 (Network Support Expense), 6120 (General Support Expense), 6534 (Plant Operations Administration Expense), and 6535 (Engineering Expense).[173] Additionally, we proposed to exclude Account 6231 (Radio Systems Expense) because we believe that the expenses reported in this account are unrelated to the administrative element relating to pole attachments.[174] We also

[169] 2 FCC Rcd at 4387, 4392 (1987), ¶ 37.

[170] The *Pole Attachment Order* labeled the elements of the carrying charge rate as "expenses" (2 FCC Rcd at 4387, 4402-03, Attachment (1987)) rather than "carrying charge rates" as we did in the *Notice* (12 FCC Rcd at 7449, Appendix A), e.g., administrative expense is labeled administrative element in our current formula elements of the carrying charge rate.

[171] *Notice* at ¶¶ 31-33.

[172] 47 C.F.R. Part 32; *see also Part 32 Order*, 2 FCC Rcd 1086 (1987).

[173] *Notice*, 12 FCC Rcd at 7449, ¶ 31.

[174] *Notice*, 12 FCC Rcd at 7449, ¶ 32; *see also* 47 C.F.R. §§ 32.6231, 32.2231(a). Account 6231 includes the original cost of ownership of radio transmitters and receivers. This investment in radio systems is maintained in Accounts 2231.1 (Satellite and Earth Station Facilities) and 2231.2 (Other radio facilities.) 47 C.F.R. § 32.2231(a).

proposed to exclude what previously were the non-administrative components of Part 31 Accounts 671 (Operating Rents), 672 (Relief and Pensions) and 677 (Expenses Charged During Construction).[175]

49. We affirm our tentative conclusion that the administrative element contain Part 32 Accounts 6710[176] and 6720[177] because those accounts contain a comprehensive set of administrative expenses which are related to operating expenses and capital costs attributable to pole attachments.[178] Even though some expenses contained in these accounts are not attributable to pole attachments, the bulk of the expenses are relevant to plant investment.[179] It is not necessary to separate out all miscellaneous expenses from the accounts used. Notably, there are minimal pole related expenses reported in other accounts that are largely not pole related and, therefore, not included in our formula calculations. We do not require the removal of every non-pole related cost from every account nor do we require every pole attachment cost be pulled from extraneous accounts.[180] The LEC utility pole owner is compensated for the pole attachment's use of space on the pole by the use of the *Cable Formula* as required by the statute.[181] Cable operators and telecommunications carriers support the inclusion of Accounts 6710 and 6720.[182]

50. We do not adopt our tentative proposal to include Accounts 6110, 6120, 6534 and 6535.

---

[175] *Notice* at ¶ 33.

[176] Account 6710 includes a summary for reporting purposes of the contents of Accounts 6711 and 6712. (47 C.F.R. § 32.6710). Account 6711 includes: executive and planning costs incurred in formulating corporate policy and in providing overall administration and management. (47 C.F.R. § 32.6711). Account 6712 includes: costs incurred in developing and evaluating long-term courses of action for the future operations of the company, including performing corporate organization and integrated long-range planning, management studies, options and contingency plans and economic strategic analysis. (47 C.F.R. § 32.6712).

[177] Account 6720 includes a summary for reporting purposes of the contents of Accounts 6721 through 6728. (47 C.F.R. § 32.6720). Account 6720 is comprised of the accounts for accounting and finance (47 C.F.R. § 32.6721), external relations (47 C.F.R. § 32.6722), human resources (47 C.F.R. § 32.6723), information management (47 C.F.R. § 32.6724), legal (47 C.F.R. § 32.6725), procurement (47 C.F.R. § 32.6726), research and development (47 C.F.R. § 32.6727), and "other general and administrative" (47 C.F.R. § 32.6728).

[178] *See* 47 U.S.C. § 224(d)(1).

[179] *See* NCTA Comments at 32-35.

[180] *See 1977 Senate Report* at 19-22; *see also American Cablesystems of Florida, Ltd.*, 10 FCC Rcd 10934 (1995).

[181] 47 U.S.C. § 224(d)(1).

[182] *See, e.g.*, AT&T Comments at 20; GTE Comments at 10; NCTA Comments at 26-34; SBC Comments at 22; USTA Comments at 16.

Generally, LEC pole owners support the Commission's proposals for adoption of Part 32 and the inclusion of Accounts 6710, 6720, 6110, 6120, 6534 and 6535.[183] In contrast, cable operators assert that if Accounts 6110, 6120, 6534, 6535 are used, the attaching entity will be paying for the same expenses twice, once through make ready charges and again as part of the pole attachment rate.[184] The cable operator or telecommunications carrier compensates the pole owner for pole attachments through project specific costs in make-ready expenses[185] and through rates based on the *Cable Formula*.[186] Account 6110, Network Support Expenses, aggregates a number of different accounts that relate to general equipment cost and maintenance not applicable to other plant specific operations expenses.[187] Account 6120, General Support Expenses, aggregates a number of accounts that relate to expenses and costs not directly attributable to pole attachments, such as art work and computers.[188] Account 6534, Plant Operations Administration Expense, includes costs incurred in the general administration of plant operations that are not transferable to project specific construction and training accounts.[189] Account 6535, Engineering Expense, includes costs incurred in the general engineering of the LEC's telecommunications plant which are not directly chargeable to a specific project.[190] If costs are attributable to a pole attachment specific project, those expenses are recorded in accounts already included in the *Cable Formula*.

51. We affirm our conclusion not to include Part 32 Account 6231 in the calculations for the administrative element because that account reports expenses associated with radio systems [191] and is

[183] *See, e.g.,* AT&T Comments at 20; GTE Comments at 10; SBC Comments at 22; USTA Comments at 16, Reply at 9-10.

[184] *See, e.g.,* NCTA Comments at 32-35; *see also* Time Warner Comments at 25.

[185] *See, e.g.,* NCTA Comments at 32-35; Time Warner Comments at 25.

[186] *See* 47 U.S.C. § 224(d)(1); *see also, e.g.,* NCTA Comments at 32-35; Time Warner Comments at 25.

[187] *See* 47 C.F.R. § 32.6110. Account 6110 (Network Support Expenses) includes a summary for reporting purposes of the contents of Accounts 6112 through 6116. Account 6110 includes: motor vehicle expense (47 C.F.R. § 32.6112), aircraft expense (47 C.F.R. § 32.6113), special purpose vehicles expense (47 C.F.R. § 32.6114), garage work equipment expense (47 C.F.R. § 32.6115), other work equipment expense (47 C.F.R. § 32.6116).

[188] *See* 47 C.F.R. § 32.6120. Account 6120 (General Support Expenses) includes a summary for reporting purposes of the contents of Accounts 6121 through 6124. Account 6120 includes: land and building expense (47 C.F.R. § 32.6121), furniture and art work expense (47 C.F.R. § 32.6122), office equipment expense (47 C.F.R. § 32.6123), general purpose computers expense (47 C.F.R. § 32.6124).

[189] *See* 47 C.F.R. § 32.6534.

[190] *See* 47 C.F.R. § 32.6535.

[191] *See* 47 C.F.R. § 32.6211, § 32.2231.

unrelated to poles.[192] There was no opposition to the exclusion of Account 6231 from the administrative element calculations. We also affirm our proposal to exclude the non-administrative expenses previously charged to Part 31 Accounts 671, 672, and 677, except to the extent the expenses are include in Part 32 Accounts 6710 and 6720.[193]

52. The following formula is adopted to determine the administrative element of the carrying charge rate of the *Cable Formula* for LEC pole owners:

$$\text{Administrative Element} = \frac{\text{Administrative and General (Accounts 6710 + 6720)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes, Plant (Accounts 4100 \& 4340)}}$$

2. The Maintenance Element

53. In the *Pole Attachment Order*, the Commission adopted procedures to identify and calculate the maintenance expenses for use in the carrying charge rate as a ratio of expenses included in the utility's pole maintenance account, to net pole investment.[194] For purposes of the calculation of the maintenance element, the denominator is the net pole investment which equals the sum of gross pole investment, minus accumulated depreciation related to poles, minus accumulated deferred income taxes related to poles.[195]

a. Pole Rental Expenses Paid to a Third Party by LEC Pole Owner

54. In the *Notice*[196] we proposed the following revised formula for the maintenance element[197] for LEC pole owners, to exclude pole rental expenses paid to third parties by the LEC pole owner, from the amount reported in Account 6411 (Poles Expense):

[192] *See* NCTA Comments at 32-35.

[193] *See, e.g.*, AT&T Comments at 20; GTE Comments at 10; NCTA Comments at 26-34; SBC Comments at 22; USTA Comments at 16.

[194] 2 FCC Rcd 4387 (1987).

[195] 2 FCC Rcd at 4387, 4402-04, Attachment B (1987).

[196] *Notice* at ¶¶ 33-34.

[197] In the *Pole Attachment Order*, 2 FCC Rcd 4387 (1987), the formula for the maintenance element included FCC Form M Part 31 Account 602.1. Account 602.1 was converted to Part 32 Account 6411. *See Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990).

$$\text{Maintenance Element} = \frac{\text{Account 6411 – Rental Expense (Poles)}}{\text{Account 2411 – Accumulated Depreciation (Poles) – Accumulated Deferred Income Taxes (Poles)}}$$

55. We affirm our tentative conclusion to exclude rental expenses from accounts that make up either the administrative or maintenance elements of the carrying charge rate of the *Cable Formula.*[198] Based on the record and current practice, we believe the most economically precise and equitable approach is not to include rents paid to third parties in either the administrative or maintenance element of the carrying charge rate for LECs. These expenses are itemized and reported on Account 6411, and can be verified and removed from the formula calculations.[199] The burden should not rest on an attaching entity to discover or determine whether rents are appropriate for inclusion in the carrying charge rate as some pole owners suggest. We disagree that the inclusion or exclusion of rental expenses should depend on what is contracted for in the rental agreement between the third party pole owner and the LEC "renter."[200]

56. The exclusion of pole rental expenses paid to a third party is necessary to avoid the attaching entity compensating the LEC pole owner for expenses related to the LEC pole owner's core business expenses rather than capital costs of providing pole attachments as required by Section 224(d)(1).[201] Account 6411 includes the rents paid by the LEC to electric utilities for the LEC's use of the electric utility's poles for the LEC's own core business. Cable operators and telecommunications carriers pay to LECs pole attachment rental fees to attach to LEC poles, and may also independently pay rental fees to the electric utility to attach to their poles. Inclusion of the LEC's rental fees paid to the electric utility in the *Cable Formula* would result in the cable operator or telecommunications carriers subsidizing the LEC's own pole rental fees and paying the electric utility twice.[202] We disagree that inclusion of pole rental expenses is appropriate because the costs are incurred in relation to plant administrative expenses.[203] We

[198] *Notice* at ¶¶ 33-34.

[199] *See* 47 C.F.R. § 32.6411; *Part 32 Guidance Letter*, 5 FCC Rcd 3898 (1990); *see also, e.g.,* NCTA Comments at 26-27, Reply at 33-34.

[200] *See, e.g.,* Ameritech Comments at 4-5, Reply at 3; Bell Atlantic/NYNEX Comments at 6. *Cf.* USTA Reply at 8.

[201] *See, e.g.,* NCTA Comments at 26-27 (inclusion of rents could result in attaching entity subsidizing the telephone company's pole rentals and paying the electric company rental fees twice), Reply at 33-34; Time Warner Comments at 26 (exclude rental expenses); USTA Reply at 8 (attaching entity should not have to determine when it is appropriate to include rental expenses in its rate); U S West Reply at 8 (appropriate to exclude to avoid double counting).

[202] *See, e.g.,* NCTA Comments at 26-27, Declaration of Patricia Kravtin at ¶ 18; Time Warner Comments at 26; USTA Reply at 8.

[203] *See, e.g.,* Bell Atlantic/NYNEX Comments at 6 (include pole rental expense in Account 6411 costs).

are not persuaded that the inclusion of these rents in pole attachment rate computations is appropriate just because it represents a business expense incurred by the LEC to conduct its core business.[204]

b. FERC Account 590

57. In the *Pole Attachment Order*, the Commission adopted the following formula to determine the maintenance element of the carrying charge rate for use by electric utility pole owners:[205]

$$\text{Maintenance Expense} = \frac{\text{Account 593 (Maintenance of Overhead Lines)}}{\left[\text{Investment in Accounts 364, 365, \& 369}\right] - \left[\text{Depreciation in Accounts 364, 365, \& 369}\right] - \left[\text{Deferred Income Taxes Related to Accounts 364, 365, \& 369}\right]}$$

58. In the *Notice*,[206] we sought comment on whether a portion of the expenses recorded in FERC Account 590 (Maintenance Supervision and Engineering)[207] should also be included in the numerator of this equation if the cost of labor and expenses reported in that account relates to poles. If so, we inquired what amount of those expenses should be allocated to the pole maintenance carrying charge. Electric utilities record the cost of labor and expenses incurred in the general supervision and direction of the distribution system maintenance in Account 590.[208] A portion of the amount in Account 590 may support supervision of the maintenance of the pole line investment. The amount in this account, however, also applies to distribution plant other than poles and conduit. If used, the amount from the account would have to be adjusted.[209] In the *Notice,* we tentatively concluded that some identifiable portion of the expenses recorded in Account 590 should be included in the maintenance element of the carrying charge rate of the *Cable Formula.*

59. As a result of our review of the record in this proceeding, we reject our tentative conclusion. We believe that any increased accuracy that would be derived from including the minute percentage of pole related expenses that may be included in Account 590, is outweighed by the complexity of arriving at an appropriate and equitable percentage of the expenses. The elements are not designed to be

[204] *See, e.g.,* Ameritech Comments at 4-5; Bell Atlantic/NYNEX Comments at 6 (include pole rental expense in Account 6411 costs).

[205] 2 FCC Rcd at 4387, 4402-03 (1987).

[206] *Notice* at ¶ 35.

[207] 18 C.F.R. Part 101.

[208] 18 C.F.R. Part 101, description of accounts; *see also* Carolina Power Comments at 52-54; Duquesne Light Comments at 30.

[209] *See, e.g.*, Carolina Power Comments at 52-54 (for poles), 71-72 (for conduit).

all inclusive nor are they intended to exclude all non-pole related expenses in the interest of simplicity.[210] Utility pole owners are adequately compensated for their costs of providing space in which an attaching entity can attach facilities necessary to support its cable or telecommunications services through the *Cable Formula* components.[211] The methodology used to arrive at a pole attachment rate should be simple and based preferably on publicly identifiable and verifiable data.[212] In our view, the existing formula for the maintenance element of the carrying charge rate achieves that objective.

60. Electric utility pole owners assert that Account 590 expenses are appropriate for inclusion in carrying charge rate factor of the *Cable Formula.*[213] Edison Electric/UTC suggests a factor of two percent of Account 590 would be appropriate,[214] while Ohio Edison contends that 22% of the expenses in Account 590 could be allocable to pole maintenance.[215] Sprint expressly supports the use of Account 590 data.[216] Cable operators contend that Account 590 is designed to cover maintenance costs that have little or no nexus to the pole network and attachment of communications facilities to such poles and that actual maintenance expenses associated with poles, conductors and services (drops) are already accounted for in other accounts.[217] Further, cable operators contend that the amount of return possible is not justified by the level of detail and calculation required.[218]

61. We disagree with electric utilities that Account 590 should be included in the carrying charge rate factor of the *Cable Formula* just because the expenses relate to the maintenance of a distribution system which may include poles.[219] The description of Account 590 advises that "direct field

---

[210] *1977 Senate Report; Telecable of Piedmont, Inc. v. Duke Power Co.*, 10 FCC Rcd 10898 (1995); *see also American Cablesystems of Florida, Ltd. v. Florida Power & Light Co.*, 10 FCC Rcd 10934 (1995).

[211] 47 U.S.C. § 224(d)(1).

[212] *First Report and Order*, 68 FCC 2d 1585 (1978); *Pole Attachment Order*, 2 FCC Rcd 4387 (1987); *see also American Cablesystems of Florida, Ltd. v. Florida Power & Light Co.*, 10 FCC Rcd 10934 (1995).

[213] *See* American Electric Comments at 66; Carolina Power Comments at 52-54, 71-72; Duquesne Light Comments at 30; Edison Electric/UTC Comments at 25-26; Ohio Edison Comments at 29; Union Electric Comments at 35.

[214] Edison Electric/UTC Comments at 26 (2% is appropriate).

[215] Ohio Edison Comments at 29 (22% of Account 590 should be allocable to pole maintenance).

[216] *See* Sprint Comments at 10.

[217] *See, e.g.,* NCTA Comments at 37; Time Warner Comments at 26.

[218] *See, e.g.,* NCTA Comments at 37; Time Warner Comments at 26.

[219] *See* American Electric Comments at 66; Carolina Power Comments at 52-54, 71-72; Duquesne Light

supervision of specific jobs shall be charged to the appropriate maintenance account." To the extent that pole owners are able to specifically identify and report maintenance costs related to poles on which there are pole attachments, those expenses should be included in Account 593 on which the maintenance element is currently based.[220] We are not persuaded that any residual expense related to poles that may be included in this account is significant.

3. The Depreciation Element

62. In the *Pole Attachment Order,*[221] the Commission adopted the following formula to determine the depreciation expense[222] for use in the *Cable Formula*:

$$\text{Depreciation Expense} = \text{Depreciation Rate for Gross Pole Investment} \times \frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}}$$

63. For the purpose of the formula calculations, net pole investment is identified as gross pole investment minus the depreciation reserve (also known as accumulated depreciation) related to poles minus accumulated deferred income taxes related to poles.[223] Under 47 C.F.R. Part 32, Section 32.22(a), LECs are required to provide their current and non-current deferred tax data in Accounts 4100 and 4340, respectively.[224] The formula for the net cost of a bare pole includes accumulated deferred taxes which are derived by adding Accounts 4100 and 4340. The sum of these two accounts is then multiplied by the ratio of gross pole investment to total gross plant investment to calculate the net deferred operating income taxes for poles.

Comments at 30; Edison Electric/UTC Comments at 25-26; Ohio Edison Comments at 29; Union Electric Comments at 35. *But see, e.g.,* NCTA Comments at 37-38.

[220] *See, e.g.,* NCTA Comments at 37; Time Warner Comments at 26. Account 593 also includes some non-pole related expenses, such as expenses for the cleaning of insulators and bushings, various functions in support of crossarms, the capital costs of which are factored out of the net cost of a bare pole as discussed elsewhere in this *Order*; *see also* 18 C.F.R. Part 101, Account 590, 593 description of accounts.

[221] 2 FCC Rcd at 4387, 4402-03, Attachment B (1987).

[222] 47 C.F.R. § 1.1404(g)(9).

[223] 2 FCC Rcd at 4387, 4402-03 (1987) Attachment B (for electric utilities and for LEC utilities). The Attachment further clarified that "[i]n using calculations using FERC Form. No. 1 data and FCC Form M data, we are treating deferred taxes as most state commissions do -- as a rate base deduction. If the state utility commission includes the reserve for deferred income taxes in the utility's capital structure at zero cost, we would not need to make any further adjustment, [as described at] ¶¶ 42-48 and note 16, *supra.*"

[224] 47 C.F.R. § 32.22(a).

64. Some LEC pole owners assert that, because pole removal costs typically exceed gross salvage proceeds by a wide margin, negative net salvage values and, consequently, negative or unusually low pole attachment rates may occur late in a pole's useful life. For example, if each of the five carrying charge formula components equals 10%, the total carrying charge rate would be 50%. This rate would then be multiplied by net pole investment, expressed on a per pole basis as net cost of a bare pole, and the percentage of usable pole space occupied by a cable operator or telecommunications carrier, to determine the maximum just and reasonable rate per pole. Since the *Cable Formula* calculation involves the multiplication of these three factors, two of which would be positive and one negative, a negative rate could result if the LECs assertions proved true.

65. The *Cable Formula* methodology anticipates depreciation rates at levels sufficient to provide each utility pole owner the opportunity to recover its plant investment on a straight-line depreciation basis over the life of the associated plant. In the *Notice,*[225] we proposed to revise the depreciation element of the *Cable Formula*. We sought comment[226] on the scope of the problem outlined in the *SWB Petition*[227] and inquired as to the number of jurisdictions where accumulated depreciation balances currently exceed gross pole investment, or may in the near future.[228] In instances where commenters believe that a modification of the pole attachment formula is necessary, we sought comment on appropriate adjustments and the circumstances in which the adjustment should be made.[229] We sought comment to determine whether net salvage value is appropriate to include in the depreciation rate or whether the application of the depreciation rate formula leads to negative net pole investment results.[230]

66. In the *Notice,*[231] we also sought comment on whether, due to the frequency with which accumulated depreciation balances exceed gross pole investment, a modification of the *Cable Formula* is necessary. Four LEC pole owners report that they currently have negative pole values due to the results of calculations using negative net pole salvage values.[232] Two other LEC pole owners predict they may

[225] *See Notice* at ¶¶ 15-16.

[226] *Notice* at ¶ 21.

[227] Southwestern Bell Telephone Company, Computation of Rates for Attachment of Cable Television Hardware to Utility Poles, Petition for Clarification or in the Alternative, a Waiver, AAD 94-125 (filed Aug. 26, 1994) (*SWB Petition*).

[228] *Notice* at ¶¶ 23.

[229] *Notice* at ¶¶ 22.

[230] *Notice* at ¶¶ 24.

[231] *Notice* at ¶¶ 21-28.

[232] *See, e.g.,* Bell Atlantic/NYNEX Comments at 3; SBC Comments at 11; Sprint Comments at 5-8 (Sprint

experience negative net pole values in the future.[233] Electric utilities report their costs of removal by different accounting methods than LECs and do not experience negative results.[234] Cable operators and some telecommunications carriers assert the reports of negative pole value are either anomalies of the accounting practices used, or are mathematically impossible.[235]

67. We find that there is some merit in all of the comments received. The problem arises from the net pole investment formula itself, under which:

NetPole Investment	=	Gross Pole Investment (Account 2411)	–	Accumulated Depreciation (Poles) (Account 3100)	–	Accumulated Deferred Income Taxes (Poles) (Accounts 4100 & 4340)

For LECs, the Accumulated Depreciation balance includes both the depreciation attributable to Gross Pole Investment *and* depreciation attributable to removal costs. However, Account 2411 does *not* include removal costs. Instead, removal costs are subtracted from gross salvage proceeds to arrive at future net salvage value. Therefore, the Accumulated Depreciation balance will ultimately exceed Gross Pole Investment, leading to negative net pole valuations. As a general matter, these atypical results are also fueled by the materiality of pole removal costs. For most telecommunication asset classes, removal costs represent a small percentage of gross investment and are usually less than gross salvage proceeds. However, poles are an anomaly in this regard. Future Net Salvage values average -73%, meaning that removal costs dwarf gross salvage proceeds, and represent a large percentage of Gross Pole Investment. Applying the depreciation of removal costs to Gross Pole Investment, therefore, accelerates the recovery period of Gross Pole Investment by over 40%.

68. As a remedy, some commenters suggested setting a minimum value for net pole investment at the last positive valuation to occur under our current formula.[236] Although we agree that this would preclude negative results, it would not cure the fundamental mismatch between the components of the Gross Pole Investment and Accumulated Depreciation calculations. Moreover, investment returns based on the difference between Gross Pole Investment and Accumulated Depreciation as defined presently are understated to the extent that removal cost depreciation is reflected in the Accumulated Depreciation balance. This inequity would persist if last positive valuations were used. Finally, last positive valuations would vary among operators and lead to inconsistent results.

Operating Companies have now); U S West Comments at 6.

[233] *See* Ameritech Comments at 2; GTE Comments at 4.

[234] *See, e.g.,* American Electric Comments at 71.

[235] *See, e.g.,* NCTA Reply at 26-29; MCI Comments at 33-37; TCI Comments at 22; Time Warner Comments at 23.

[236] *See, e.g.,* NCTA Reply at 28-29.

69. Instead, we will eliminate the *cause* of the negative results. Specifically, when the Accumulated Depreciation attributable to removal costs is isolated as an offset to gross removal costs under the future net salvage calculation, negative results are eliminated. This allows a proper matching of depreciation and corresponding sources, and provides an accurate basis for calculating investment returns. Account 3100, as used in the *Cable Formula*, is redefined to include only that portion of Account 3100 which arises from the depreciation of Account 2411. The remaining component of Account 3100, accumulated depreciation for removal costs, is netted separately under the future net salvage calculation. The total depreciation recovery remains unchanged, but the risk of negative carrying charge components has been eliminated. The LECs recovery basis is now comparable to that of electric utility pole owners.

70. Consequently, for the purposes of *all* affected formulas, we redefine Net Pole Investment as:

$$\begin{array}{l}\text{Net Pole} \\ \text{Investment}\end{array} = \begin{array}{c}\text{Gross Pole} \\ \text{Investment} \\ \text{(Account 2411)}\end{array} - \begin{array}{c}\text{Accumulated} \\ \text{Depreciation (Poles)} \\ \text{(Account 3100)}\end{array} - \begin{array}{c}\text{Accumulated Deferred} \\ \text{Income Taxes (Poles)} \\ \text{(Accounts 4100 \& 4340)}\end{array}$$

where Accumulated Depreciation (Poles) includes *only* that portion of Account 3100 which arises from the depreciation of Account 2411. The portion of Accumulated Depreciation (Poles) attributable to removal costs shall be treated as an offset to gross removal costs when calculating future net salvage value.

4. The Taxes Element

71. In the *Notice*,[237] we sought comment on whether the taxes element of the carrying charge rate of the formula used for LEC pole owners should reflect certain tax-related accounts. We also proposed that changes from Part 31 to Part 32 accounting for LEC pole owners should be reflected under the following formula:

$$\begin{array}{l}\text{Tax} \\ \text{Element}\end{array} = \frac{\text{Operating Taxes (Account 7200)}}{\begin{array}{c}\text{Gross Plant Investment} \\ \text{(Account 2001)}\end{array} - \begin{array}{c}\text{Accumulated Depreciation} \\ \text{(Account 3100)}\end{array} - \begin{array}{c}\text{Accumulated Deferred Taxes} \\ \text{(Plant, Accounts 4100 \& 4340)}\end{array}}$$

72. We believe the proposed accounts and methodology for the taxes element of the carrying charge rate provide utility pole owners with appropriate compensation when used under the *Cable Formula*.[238] Although a one-to-one matching of tax elements from Part 31 to Part 32 may not be achievable in all instances, we believe the proposed tax element formula will provide reasonable results in

[237] *Notice* at ¶ 36.

[238] *Notice*, 12 FCC Rcd at 7449, Appendix B.

an expeditious manner.[239] Basing the tax element of the carrying charge rate on pole investment, rather than plant investment as proposed by utility pole owners,[240] may produce results decidedly different from the actual tax experience of pole owners and are subject to manipulation. Similarly, the application of statutory tax rates instead of tax rates based on actual individual experience are likely to produce overstated tax carrying charge rate that would result in artificially higher pole attachment rates.

73. We affirm the use of our proposed formula. Our policy in applying the *Cable Formula* does not eliminate all non-pole related expenses from all accounts used in the carrying charge rate.[241] We are not required to disaggregate accounts to eliminate possible non-pole related investments or expenses, nor are we required to scour all utility accounts for every dollar that may benefit a pole attachment.[242] We do not believe the statutory Federal income tax rate, rather than actual taxes paid, should be used in calculating the taxes element of the carrying charge rate factor of the *Cable Formula* because the actual taxes paid are readily available from the utility pole owners' regulatory agency data.[243]

5. The Rate of Return Element

74. The rate of return element[244] is currently taken from the rate of return authorized for the utilities' intrastate services. In the *Notice,* we noted that this policy implicitly assumes that the states will continue to regulate utility rates on a rate of return basis, when in fact many states are moving away from that method of regulation and have adopted incentive-based regulation.[245] We tentatively concluded that in such cases the authorized intrastate rates of return will not reflect the utilities' costs of capital.[246]

75. The Commission has adopted an annual rate of return for the interstate access services of LECs of 11.25%.[247] In the *Notice,* we sought comment on whether 11.25% should be used as the rate of

[239] *See, e.g.*, AT&T Reply at 25; NCTA Comments at 26-27.

[240] *See, e.g.*, Bell Atlantic/NYNEX Comments at 7.

[241] *American Cablesystems of Florida,* 10 FCC Rcd 10934, at ¶ 10. *But see* American Electric Comments at 58-67; Carolina Power Comments at 56.

[242] *See 1977 Senate Report* at 19-20; *American Cablesystems of Florida, Ltd.,* 10 FCC Rcd 10934; *see also* NCTA Comments at 26-34; Time Warner Comments at 24-26.

[243] *See* Bell Atlantic/NYNEX Comments at 7.

[244] *See* 47 C.F.R. § 1.1404(g)(10).

[245] *Notice* at ¶ 37.

[246] *See Notice* at ¶ 37; *see also* 47 U.S.C. § 224(d)(1).

[247] *See Represcibing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers,* CC

return when calculating the carrying charge rate factor of the *Cable Formula*, for utilities in states that no longer regulate that utility on a rate of return basis.[248] In the *Notice*,[249] we proposed the following as the return element of the carrying charge rate for use in the *Cable Formula*:

$$\text{Return Element} = \text{Applicable Rate of Return}$$

76. We affirm our tentative conclusion to continue the use of the rate of return authorized by the state for intrastate services of the utility, when available.[250] Commenters generally agree that the rate of return set by the Commission for LECs, as modified from time to time, is a reasonable default rate of return for use in the *Cable Formula* when an actual rate of return is not prescribed by the state.[251] NCTA points out, however, that, if the utility's actual realized rate of return is lower than the default, it would be inequitable to allow it a higher rate of return than its actual rate.[252] We believe that the use of the default rate of return is an equitable solution, in those instances when a state has not prescribed a rate of return for a utility covering the period of time in which rates were in dispute. We adopt as the default rate of return, the rate of return set by the Commission for LECs, covering the appropriate period, as it is modified from time to time.[253] We believe this serves our policy of using default rates to expedite the *Cable Formula* calculations.

VI. FORMULA FOR DETERMINING ATTACHMENT RATES FOR CONDUITS

A. Background

77. Conduits are structures that provide physical protection for cables and allow new cables to be added inexpensively along a route, without having to dig up the landscape, streets and other structures in

---

Docket No. 89-624, 5 FCC Rcd 7507 (1990).

[248] *Notice* at ¶ 37.

[249] *Notice*, 12 FCC Rcd at 7449, Appendix A.

[250] *See* 47 C.F.R. § 1.1404(g)(10); *see also Alabama Power*, 773 F.2d at 371-72.

[251] *See, e.g.*, American Electric Comments at 69; Bell Atlantic/NYNEX Comments at 2, 5; ConEd Comments at 4-5, 14; GTE Comments at 11; MCI Comments at 20-21; NCTA Comments at 38; SBC Comments at 22-23; Sprint Comments at 10; Union Electric Comments at 37.

[252] NCTA Comments at 38.

[253] The current rate of return of 11.25% is subject to revision by the Commission. *See* Common Carrier Bureau Sets Pleading Schedule in Preliminary Rate of Return Inquiry, 11 FCC Rcd 3651 (1996) and 47 C.F.R. § 65.101; *see also* AT&T Comments at 20 (citing *Local Competition Order*, 11 FCC Rcd 15499, 15856, ¶ 702).

the community each time a new cable is installed. A collection of conduits, together with their supporting infrastructure, constitutes a conduit system.[254] A conduit consists of one or more ducts, which are the enclosures that carry the cables.[255] Often, when cable system or telecommunications carriers' cables are placed in a duct, three or more inner ducts are inserted into the duct allowing "one duct to be treated more like conduit."[256] Section 224 provides that for conduit, the capacity of the conduit is the equivalent of usable space in the pole context.[257]

78. Congress authorized the Commission to regulate rates, terms, and conditions for pole attachments in ducts and conduits under Section 224 which states:

> . . . a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the . . . total duct or conduit capacity, which is occupied by the pole attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire . . . duct [or] conduit.[258]

The *1977 Senate Report* outlined Congressional intent regarding the methodology the Commission should apply when determining whether a rate was just and reasonable for pole attachments on poles and in ducts, conduit and rights-of-way.[259] It was not until 1996, however, that the Commission had before it a complaint about rates charged by a utility for attachments in a conduit.[260]

79. In the *Notice*,[261] we sought comment on application to conduits of the attachment formula used to calculate the maximum rate for poles, and on several issues relating to how to determine the percentage of capacity occupied by an attachment:[262] how to identify the total capacity and costs

[254]*See NESC* § 2; *see also* American Electric Comments at 84.

[255]*NESC* § 2.

[256]Edison Electric/UTC Comments at 22 n. 7.

[257]*See* 47 U.S.C. § 224(d)(1).

[258]47 U.S.C. § 224 (d)(1).

[259]*1977 Senate Report* at 19-20.

[260]*Multimedia Cablevision v. SWB*, CS Docket No. 96-181, 11 FCC Rcd 11202 (1996) ("*Multimedia Cablevision*").

[261]*Notice* at ¶¶ 38–46.

[262]47 U.S.C. § 224(d)(1).

attributable to the conduit, and whether conduit owned by an electric utility is sufficiently different from conduit owned by a LEC or other utility to warrant special treatment. The conduit methodology proposed in the *Notice* to determine the maximum just and reasonable rate per attachment is represented as follows:[263]

$$\text{Maximum Rate} = \frac{1\,\text{Duct}}{(\text{Avg. No. of Ducts} - \text{Adjustments for Reserved Ducts})} \times \frac{1}{2} \times \text{Net Linear Cost of Conduit} \times \text{Carrying Charge Rate}$$

80. This formula follows the same methodology that we use for determining just and reasonable rates for pole attachments on poles,[264] and uses a half-duct rebuttable presumption for capacity used by a pole attachment in a conduit.[265] The Commission first applied this adaptation, based on the unique characteristics of duct and conduit systems, in *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone,* where the Commission concluded that it was a simple and efficient mechanism for establishing a conduit rate consistent with Section 224.[266]

$$\text{Maximum Rate} = \underbrace{\left[\frac{1}{\text{Number of Ducts}} \times \frac{1\,\text{Duct}}{\text{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\text{No. of Ducts} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \text{Carrying Charge Rate}$$

B. Discussion

1. Conduit Formula Methodology

82. Just as we use the entire pole inventory for establishing a rate for pole attachments to poles, we believe it is appropriate to use system-wide data for establishing the maximum rate for conduit. Some electric utilities argue that, due to disparities in cost between urban and suburban conduit, using system-wide costs will not provide adequate compensation.[267] We note, however, that the electric utilities that raise the issue have themselves proposed calculating the carrying charges on a system-wide basis.[268]

[263] *Notice*, 12 FCC Rcd 7449 at Appendix C.

[264] *Notice* at ¶¶ 38-42.

[265] *See Greater Media, Inc., et al. v New England Telephone and Telegraph Co.*, No. DPU 91-218 (Mass. Dep't Pub Utils. April 17, 1992), applied in *Multimedia Cablevision*, 11 FCC Rcd 11202 (1996).

[266] *Multimedia Cablevision*, 11 FCC Rcd 11202 (1996).

[267] *See, e.g.*, Carolina Power Comments at 66; Ohio Edison Comments at 35.

[268] *See, e.g.*, Carolina Power Comments at 68–75; NCTA Reply at 48-50.

Similarly, as has been pointed out by Time-Warner and NCTA, calculating the cost of the conduit on a system-wide, or averaging, basis will adequately compensate the utilities.[269]

83. We are not persuaded by the electric utilities' contentions that they lack the detailed information necessary to apply the proposed formula.[270] They assert that use of specific FERC accounts is inconsistent among utilities.[271] Necessary figures are available in underlying records filed to support claims in sworn FERC submissions, and only in rare instances would a utility lack detailed information because it has no records.[272] Where such records do not exist, other sources of information may be used.[273] Electric utilities have demonstrated their ability to calculate a rate by applying the formula.[274] Although the conduits which comprise a conduit system may vary widely from urban to suburban or rural locales,[275] we will use the system-wide historical cost of the conduit in the formula.

2. Conduit Physical Characteristics

84. In the *Notice,* we asked whether there are physical differences between conduit owned and used by electrical or other utilities and conduit owned by cable systems or telecommunications carriers that would affect the rates for attachment to conduits.[276] We hypothesized that there would be differences related to conduit construction, maintenance and safety. We asked whether these differences should affect the rate for these facilities.[277]

---

[269]Time Warner Reply at 10–11; NCTA Reply at 49, 55.

[270]*See, e.g.,* American Electric Comments at 80-96, Reply at 40-41; Carolina Power Reply at 38-39; ConEd Comments at 6; Edison Electric/UTC Comments at 19-20; Ohio Edison Comments at 36; Union Electric Comments at 9, 11.

[271]*See, e.g.,* Carolina Power Comments at 65; Edison Electric/UTC Comments at 17-18.

[272]*See, e.g.,* MCI Reply at 44-45; NCTA Reply at 48.

[273]See, e.g., NCTA Reply at 49 (citing *Capital Cities Cable, Inc. v. Mountain States Telephone and Telegraph Co.*, File Nos. PA-81-0031, PA-81-0039, PA-82-0051, Mimeo 84786 at 4 (June 29, 1984); *Teleprompter Corp. v. Washington Water Power Co.*, 50 R. R. 2d 54 (1981)).

[274]*See, e.g.,* Carolina Power Comments at 68-75.

[275]*See, e.g.,* Carolina Power Comments at 62, 65-75; Duquesne Light Comments at 7; NCTA Comments at 40; Ohio Edison Comments at 43; Time Warner Comments at 27.

[276]*Notice* at ¶¶ 38–46.

[277]*Notice* at ¶ 36.

85. Some electric utilities comment that such differences do exist and should have an impact on the rate.[278] Specifically, they assert that electric conduits have safety and reliability considerations that warrant special caution due to potential dangers to untrained personnel, electric equipment, and high voltage requirements and that such concerns require special procedures and precautions.[279] They argue that these necessary precautions translate into additional costs and, therefore, impact just and reasonable rates.[280] These costs, however, are currently reflected in the rates. Infrastructure investment required to assure safety and reliability is captured in the accounts used to calculate the net book value of the respective types of conduit. Special precautions related to placement of communications cables in conduit are included in make-ready costs. All special precautions taken in maintenance of the system are reflected in the maintenance element of the carrying charge rate.

3. Factors of the Conduit Formula

86. The first factor of the formula, Conduit Capacity, is determined using the following variables:

"No. of Inner Ducts" is the number of inner ducts placed in the duct. If there are no inner ducts the value would be presumed to be two, reflecting the rebuttable presumption that not more than half of a duct is occupied.

"No. of Ducts" is the total number of ducts in the conduit system. This number does not include collapsed or otherwise damaged ducts that are not repairable. In general, this would be presumed to be the average number of ducts per conduit for the system.

87. The second factor of the formula, Net Linear Cost of Conduit, is determined using the following additional variables:

"Net Conduit Investment" is gross conduit investment less the accumulated depreciation and accumulated deferred taxes.

"System Duct Length" is the sum of the length of all ducts in the system minus the length of collapsed ducts and the length of ducts that for other reasons are physically unable to contain cable. The System Duct Length may be arrived at in one of three ways: First, it may be obtained from available records. Second, the length of the conduit in the system may be multiplied by an estimated average number of ducts per

[278] *See, e.g.,* Carolina Power Comments at 61, Reply at 38; ConEd Comments at 3; Edison Electric/ UTC Comments at 18-19; Dayton Power and Light Comments at 3; Public Service Co. of New Mexico at 5.

[279] *Notice* at ¶ 43.

[280] *See, e.g.,* Carolina Power Reply at 38; ConEd Comments at 3; Edison Electric/ UTC Comments at 18-19; Union Electric Comments at 11.

conduit. Third, the length of all ducts in the system is the sum of the products of the length of each conduit times the number of ducts in that conduit.[281]

88. Calculation of the maximum rate may be simplified by using the presumptions and using the Net Linear Cost of a Conduit for the second term in the formula. The formula then is, essentially, our proposed formula:

$$\text{Maximum Rate (System - Wide)} = \underbrace{\frac{1/2 \text{ Duct}}{\text{Avg. No. of Ducts}}}_{\text{[Percentage of Conduit Capacity]}} \times \underbrace{\frac{\text{Net Conduit Investment}}{\text{System Conduit Length}}}_{\text{[Net Linear Cost of a Conduit]}} \times \text{Carrying Charge Rate}$$

We discuss in greater detail below each of the factors within the formula.

a. Percentage of Total Capacity Occupied

i. Total Duct or Conduit Capacity

89. The total capacity of a duct or conduit is the entire volume of available capacity in the conduit system.[282] All costs associated with the construction of the conduit system are considered in determining the cost of this total capacity.[283] In the *Notice*, we sought comment on how to allocate capacity for various uses in a conduit,[284] and whether a utility may eliminate some of its conduit capacity from the total capacity as used in the formula, by reserving some capacity for use for maintenance, future business needs, or for space set-aside for use by a state or local government.[285] A utility may designate a maintenance duct so that if a cable in another duct fails, a temporary cable may be placed in the maintenance duct and spliced into the damaged cable.[286] A duct so designated is usable in the event it is

[281]To simplify calculation the Net Linear Cost of Conduit for the system may be used in lieu of the product of the No. of Ducts and the Net Linear Cost of a Duct. The Net Linear Cost of Conduit is the Net Conduit Investment divided by the System Conduit Length.

[282]*See, e.g.*, Carolina Power Comments at 75; NCTA Reply at 52-54.

[283]This is a departure from our position in the *Telecommunications Report and Order*, in which we concluded that a certain portion of construction costs might not be associated with the system's capacity. *Telecommunications Report and Order* at ¶ 110. Based on the expanded record and *Petitions for Reconsideration and/or Clarification of the Telecommunications Report and Order,* we now believe that all costs associated with the construction of the conduit system are used in creating the system's capacity and are properly considered in the cost of that capacity.

[284]*Notice* at ¶¶ 38–46.

[285]*Notice* at ¶ 45; *see also Local Competition Order* at ¶¶ 1165-1170.

[286]*See, e.g.,* AT&T Comments at 23; Carolina Power Comments at 63; Duquesne Light Comments at 7–8; Ohio

needed and, therefore, is part of the conduit capacity. Municipal ducts are those that may be allocated for the use of the local government as a condition in a franchise, license, right-of-way or other agreement.[287] Where a duct is required by the municipality to be set aside for potential future use, in the nature of consideration as a condition for a license, franchise, or permit, the costs attributable to that unused capacity are part of the total cost of the conduit. The utility is compensated for those costs as part of its net conduit investment and/or in the carrying charge rate. Ducts may be reserved, or kept unused to be available to the utility for expansion of its core business services.[288]

90. The question of reducing the amount of total capacity of a duct or conduit based on some theoretical or potential need, unduly complicates the conduit formula methodology.[289] The clear language of the statute dictates that the amount of "total duct or conduit capacity" is to be used when calculating a percentage of capacity occupied by a pole attachment. We will not allow capacity designated for maintenance, future business plans, or municipal set-asides to be subtracted from the total duct or conduit capacity.[290] The record supports our finding that capacity in a duct or conduit that is usable for any of these purposes is part of the "total duct or conduit capacity."[291] A methodology which attempts to account for any possible variations would require substantial oversight and regulation to prevent abuses or over recovery. Such regulation and complexity would be contrary to the clear language of the statute.[292]

91. Ducts which have collapsed or are otherwise damaged and are no longer available for pole

---

Edison Comments at 35; SBC Comments at 30–31.

[287] *See, e.g.,* SBC Comments at 32 (imposed as condition of granting right-of-way).

[288] *See* ConEd Comments at 9–11; Duquesne Light Comments at 8; Ohio Edison Comments at 35.

[289] *1977 Senate Report*; 47 U.S.C. § 224(d)(1); *see also,* NCTA Comments at 43-44.

[290] This is also a departure from our position in the *Telecommunications Report and Order*, in which we said such reserved capacity would be designated as "unusable space" for purposes of calculating an unusable space factor. *Telecommunications Report and Order* at ¶ 110. Based on the expanded record and *Petitions for Reconsideration and/or Clarification* of the *Telecommunications Report and Order*, we now believe there is no unusable capacity in a conduit system. For whatever reason space may be reserved or designated for special uses and regardless of who may benefit from those uses, the space is capable of being used, and it remains part of the total capacity of the duct or conduit.

[291] 47 U.S.C. § 224(d)(1). *See, e.g.,* AT&T Reply at 29 (municipal set aside is often put to commercial use); NCTA Comments at 43-44 (generally, dedicated ducts are not reserved for exclusive use by municipality), Reply at 51-54 (duct used by any party is usable, identity of the party is irrelevant to the duct's usability); Time Warner Comments at 28 (maintenance ducts should be considered usable).

[292] *See 1977 Senate Report* at 19-20; 1996 Act, Preamble, *Conf. Rpt.* at 113.

attachments should not be included in the capacity of a conduit or duct.[293] Some of these ducts can be repaired.[294] Ducts that cannot be restored no longer provide capacity to the conduit and, by definition, do not constitute ducts.[295]

ii. Occupied Capacity, the Half-Duct Presumption

92. Presumptions are used in the *Cable Formula* to expedite the calculations of a just and reasonable rate so that complicated surveys, accounting and calculations may be avoided.[296] We proposed and sought comment on a methodology that presumes rebuttably that an attachment in a conduit occupies one half of a duct, and invited additional proposals to make the methodology simple and administratively efficient.[297]

93. We retain the rebuttable presumption adopted in *Multimedia Cablevision* that an attacher occupies one half of a duct, and no more. There we accepted the findings of the Massachusetts Department of Public Utilities that a cable system attachment occupies only one-half of a duct, does not preclude the use of the other half of the duct, and that, therefore, the cable system should not be charged for the use of the entire duct.[298] The record supports the retention of this presumption.[299]

94. Some electric utilities assert, however, that an electric supply cable cannot share a duct with a communications cable, and, therefore, from the electric utility point of view, the communications cable occupies the entire duct.[300] Some of these utilities also point out that for certain electric supply cables, minimum spacing requirements do not permit a communications cable in an adjacent duct, and, therefore, from their point of view, the communications cable occupies the adjacent ducts as well.[301] The

[293] *See, e.g.*, NCTA CS Dkt. No. 97-151 Comments at 25-26; SBC Comments at 72–73.

[294] *Greater Media* at ¶ 69.

[295] *NESC* § 2.

[296] *Second Report and Order,* 72 FCC 2d 59 (1979); *see also,* NCTA Reply at 46-47.

[297] *Notice* at ¶¶ 38–46.

[298] *Id.*, (referencing *Greater Media,* at ¶¶ 74-75).

[299] *See, e.g.*, Ameritech Comments at 7, Reply at 6; GTE Comments at 16, Reply at 17; SBC Reply at 14-15; USTA Comments at 20-22, Reply at 45; NCTA Comments at 40.

[300] *See, e.g.*, American Electric Comments at 85–87; ConEd Comments at 5–6; Duquesne Light Comments at 8; Edison Electric/UTC Comments at 20–21 .

[301] *NESC*, Rule 341A6 (1997 Ed.). *See* Edison Electric/UTC Comments at 21; Carolina Power Comments at 75.

situation is somewhat analogous to the safety space on a pole although it does involve a NESC prescribed exclusion zone around the electric supply cable. Electric utilities do not dispute that the capacity is usable, but argue that the full capacity of the duct is occupied by the communications cable because the electric utility is prevented from using that capacity by the NESC.[302] Communications cables may, and often do, share a duct.[303] The NESC requires that, where electric supply cables share a duct with communications cables, the cables be maintained by the utility.[304] It cannot be said, therefore, that any given communications cable occupies a whole duct. If the electric supply cable excludes other cables from the duct it occupies, it is that electric supply cable that occupies the entire duct, not the communications cables it excludes. Similarly, if the electric supply cable cannot tolerate communications cables in adjacent ducts, then the electric utility's supply cable effectively occupies those adjacent ducts not the communications cable. Conversely, if the electric supply cable cannot be placed in a duct because the duct is partially occupied by a communications cable, the reason is that the duct contains less available capacity than the electric supply cable requires. The capacity is available to other communications cables and is, therefore, not occupied.

95. Some cable operators assert that even the application of the half-duct methodology will result in rates that are unreasonably high in light of current inner-duct technology.[305] The term "inner-duct" generally refers to small diameter (1" or 1½") pipe or tubing placed inside a conventional duct to allow the installation of multiple wires or cables.[306] Use of inner-duct is a common practice. Some electric utilities recommend that we require the first attacher in a previously unoccupied duct to install inner-duct.[307] The cost of the inner-duct would, presumably, be considered a make-ready cost.[308] Ameritech urges that a presumption of less than one half of a duct would reflect what is possible, but not what is currently in place and what is practical under existing conditions.[309] We will not require installation of inner-duct. The half-duct presumption is rebuttable, and the presence of inner-duct is adequate rebuttal. We have made direct provision in the formula for that contingency. Where inner-duct is installed, either by the attacher or in a previous installation, the maximum rate will be reduced in proportion to the fraction of the duct occupied.

---

[302] *See, e.g.*, ConEd Comments at 5–6; Duquesne Light Comments at 8; Edison Electric/UTC Comments at 20–21.

[303] *See* ConEd Comments at 9; Duquesne Light Comments at 14.

[304] Edison Electric/UTC Comments at 20; Duquesne Light Comments at 8; MCI Reply at 42.

[305] *See, e.g.*, NCTA Comments at 42; TCI Comments at 16; Time Warner Comments at 28.

[306] MCI Comments at 25; *see also* Edison Electric/UTC Comments at 22.

[307] *See, e.g.*, ConEd Comments at 7–9; Duquesne Light Comments at 14; Edison Electric/UTC Comments at 22.

[308] ConEd Comments at 5–7.

[309] *See* Ameritech Reply at 6; *see also*, Bell Atlantic/NYNEX Reply at 15; NCTA Reply at 42-43.

That fraction will be one divided by the number of inner-ducts in the duct, so that a default presumption of capacity occupied is one-half duct, or the actual percentage of capacity occupied.

4. Net Linear Cost of Conduit

96. As indicated in the *Notice*, in the conduit context, we use the net linear cost of the conduit, as compared to the net cost of a bare pole, as one factor within the formula for determining the rate. The *Notice* presumed, without discussion and without specifically seeking comment, that utilities would be capable of determining this figure. As the net cost of a bare pole reflects the total system investment for the above ground pole attachment infrastructure, to arrive at a system investment for use in the conduit formula we identify the net linear cost of the conduit system. To accomplish this, the utility must first establish the Net Conduit Investment as discussed below.

a. Net Conduit Investment

97. The formula requires the determination of the utility's net linear cost of its conduit system. The Net Conduit Investment is calculated as follows:

$$\text{Net Conduit Investment} = \text{Gross Conduit Investment (ARMIS Account 2441/ FERC Account 366)} - \text{Accumulated Depreciation (Conduit)} - \text{Accumulated Deferred Taxes (Conduit)}$$

98. Gross Conduit Investment for the LEC consists of Part 32 Account 2441.[310] For the electric utility, Gross Conduit Investment is reflected in FERC Part 101 Account 366.[311] For LECs, Accumulated Depreciation (Conduit) represents the share of ARMIS Account 3100 that corresponds to Account 2441.[312] For electric utilities, Accumulated Depreciation (Conduit) represents the share of FERC Account 108 that corresponds to Gross Conduit Investment valuations included in Account 366.[313]

99. In the *Notice*[314] we proposed a formula for the calculation of accumulated deferred income taxes for conduit. The formula is shown as:[315]

---

[310]47 U.S.C. § 32.2441.

[311]*See* 18 C.F.R. Part 101 (stating the accounts associated with the conduit attachment formula for electric utilities); *see also* 47 C.F.R. Part 32 (stating accounts associated with the conduit formula for LECs.

[312]*Part 32 Guidance Letter,* 5 FCC Rcd 3898 (1990). *See* ARMIS Report 43-02, row 0470.

[313]18 C.F.R. Part 101.

[314]12 FCC Rcd 7449 (1997) at Appendix C.

[315]For regulatory accounts to be used in the formulas, *see* Appendix C-3 and C-4 for LEC and electric utility

$$\text{Accumulated Deferred Income Taxes (Conduit)} = \frac{\text{Gross Conduit Investment}}{\text{Total Gross Plant}} \times \text{Total Accumulated Deferred Income Taxes}$$

100. Total Accumulated Deferred Income Taxes for electric utilities are based on FERC Account 190.[316] However, LEC conduit owners object to this formula on the basis that the actual amount of Accumulated Deferred Income Taxes for conduit is available directly from the LEC's books.[317] BellSouth maintains that because it is required to keep separate and accurate records of accumulated deferred income taxes for poles and conduit, our formula will improperly introduce non-conduit related deferred taxes into rate calculations.[318] NCTA argues that LECs should not use accumulated deferred income taxes figures taken from the LEC's books because the information is not publicly available.[319]

101. The *Pole Attachment Order* did not specifically require the use of proration as a method to be used in the calculation of the net costs of a bare pole,[320] which we apply in this context for conduit, and only noted that accumulated deferred income taxes were to be used in calculations.[321] Our goal has always been to adopt a formula which set the maximum rate using publicly available data, in a fair and expeditious manner.[322] We also have a policy against requiring additional accounting procedures so long as the information is available from the utilities upon reasonable request.[323] As the LEC conduit owner is required to keep this data precisely as required for the formula, we will allow them to use it in the rate calculation.[324]

---

conduit, respectively.

[316]18 C.F.R. Part 101, Description of Accounts, Account 190.

[317]*See, e.g.*, Bell South Comments at 8; GTE Comments at 14; SBC Comments at 20.

[318]Bell South Comments at 8.

[319]NCTA Reply at 33–34.

[320]*Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

[321]2 FCC Rcd 4387 (1987).

[322]*Pole Attachment Order*, 2 FCC Rcd 4387 (1987) at ¶ 37.

[323]*Second Report and Order*, 72 FCC 2d 59 at ¶ 32.

[324]*See* BellSouth Comments at 8. The subsidiary accounts for Accounts 4100 and 4340 are required to be maintained and reported to the Commission. *See* 47 C.F.R. §§ 43.21, 43.43, 32.4100 and 32.4340. *See also*, Biennial Regulatory Review, Review of Accounting and Cost Allocation Requirements, FCC 99-106 at ¶ 15 (*rel.* June 30, 1999) and Biennial Regulatory Review, Review of ARMIS Reporting Requirements, FCC 99-107 at ¶ 13 (*rel.* June 30, 1999).

102. To determine the net conduit investment for conduit owned by an electric utility, we base the gross conduit investment on Account 366. Edison Electric/UTC suggests that portions of Accounts 367 (Underground conductors and devices) and 369 (Services) should be included.[325] We disagree. Conductors and related devices are part of the utility's core business services' infrastructure, and such capital expenses are not included in the *Cable Formula* for poles.[326] Account 367 may include some costs of installed materials that provide support for the conduit system, but such a portion of that account is reflected in the maintenance element calculations. The electric utility has an opportunity to recover appropriate expenses reported in those accounts in the carrying charges.

103. We also reject electric utilities' suggestions that portions of Accounts 580 (Operation - Supervision and Engineering) and 583 (Operation - Overhead Line Expenses, Major Utilities Only) should be included, even if they may contain some expenses incurred with respect to the electric power distribution plant.[327] The descriptions of the expenses included in FERC Part 101 Accounts 367, 369, 580 and 583, relate directly to the electric utilities' core business operations rather than "actual capital costs attributable to the entire pole, duct, conduit or right-of-way."[328] The same appears true of FERC Accounts 357 (Underground Conduit), 358 (Underground Conductors and Devices), 371 (Installation on Customer Premises), and 373 (Street Lighting and Signal Systems) which are also not included in the formula.[329]

b. System Duct Length

104. The denominator for the Net Linear Cost of Conduit element within the formula is based on duct length. In the *Notice* we indicated that duct length could be stated as per linear meter or per linear foot.[330] In response, some electric utilities argue that they are not capable of readily computing conduit investment on per linear foot or meter basis because FERC accounts associated with underground system only track dollar values and not linear measurement.[331] The record indicates that the utilities often have the data required for the calculations and, when they do not have the data they can estimate it from the data

[325] *See, e.g.,* Edison Electric/UTC Comments at 25.

[326] *Notice* at ¶ 42.

[327] *See* Carolina Power Comments at 50-52; *see also* 18 C.F.R. Part 101: descriptions of accounts and operating expense reporting instructions.

[328] 47 U.S.C. § 224(d)(1).

[329] *See* 18 C.F.R. Part 101, Description of Accounts.

[330] *Notice* at ¶ 39 n.76.

[331] *See, e.g.,* Ohio Edison Comments at 42.

they have.[332] The net cost data is available from FERC reports and, although electric utilities are not required to report the linear footage of conduit deployed, we are informed that they routinely produce linear footage data during state conduit rate proceedings.[333] Electric utility corporate or engineering departments have records on installed plant.[334] Moreover, as NCTA observes, when a utility is unable to obtain the requisite data, information from other sources may be used.[335] A determination of the total length of duct and conduit in the system can be made with a precision comparable to that reached in determining the number of poles owned by the utility. The utility must, however, specify the method used for computing the duct length and must disclose this information to all attachers upon request.

5. Carrying Charge Rate (Conduit)

105. The elements of the carrying charge rate are: administrative, maintenance, depreciation, taxes and rate of return.[336] In the *Pole Attachment Order*,[337] the Commission identified the regulatory accounts to be used, where possible, in applying the *Cable Formula* to determine the maximum allowable rate for pole attachments on poles. The Commission addressed the pole attachment formula and accounts to be used for determining a pole attachment rate for LEC-owned conduit systems in *Multimedia Cablevision.*[338] The accounts to be used for an attachment rate for a conduit system owned by an electric utility will be accounts reported to FERC that are comparable to the LEC accounts identified in *Multimedia Cablevision*,[339] as discussed in this *Order.*[340]

106. To calculate the carrying charge rate, the Commission developed a formula that relates each of these elements to a utility's net plant investment appropriate to the location of the pole attachment (e.g., poles, conduit system, right-of-way).[341] That formula is:

[332]*See* Time Warner Reply at 10; *see also* NCTA Comments at 48.

[333]NCTA Reply at 48–50; *see also* MCI Reply at 39–40.

[334]*See, e.g.,* Carolina Power Comments at 66.

[335]NCTA Reply at 49.

[336]*Pole Attachment Order*, 2 FCC Rcd at 4387, 4391 (1987), ¶ 25.

[337]2 FCC Rcd 4387, 4402-03, Attachment B (1987); *see also American Cablesystems of Florida, Ltd.*, 10 FCC Rcd 10934 (1995).

[338]11 FCC Rcd 11202 (*rel.* Sep. 3, 1996).

[339]11 FCC Rcd 11202 (1996).

[340]*See* Appendix C-3 for LECs and Appendix C-4 for electric utilities.

[341]*Pole Attachment Order*, 2 FCC Rcd at 4387, 4402-03, Attachment B (1987).

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Rate of Return}$$

107. The administrative, taxes, and rate of return elements will be the same for use in a formula for pole attachments in conduits and rights-of-way as on poles. We have already discussed those elements, and the appropriate accounts and methodologies to develop the figures to be used in the full formula in previous sections and will not repeat our discussion here. The maintenance and depreciation elements, with the accounts and methodologies specific to conduits, are discussed in this *Order*. The *Cable Formula* for application to attachments in conduits owned by LEC and electric utilities, with all components, elements and accounts used, are attached to this *Order* as Appendix C-3 and C-4, respectively.

a. Maintenance Element

108. In the *Pole Attachment Order*, the Commission adopted procedures to identify and calculate the maintenance expenses for use in the carrying charge rate as a ratio of expenses included in the utility's maintenance account, to net investment.[342] For purposes of the calculation of the maintenance element, the denominator is the net investment which equals the sum of gross investment, minus accumulated depreciation related to conduit systems, minus accumulated deferred income taxes related to conduit systems.[343]

i. LEC owned Conduit

109. In the *Notice,* we proposed the following methodology for the maintenance element of the carrying charge rates of the *Cable Formula* for LEC conduit owners:[344]

$$\text{Maintenance Element} = \frac{\text{Account 6441}}{\text{Account 2441} - \text{Accumulated Depreciation, conduit} - \text{Accumulated Deferred Income Taxes}}$$
$$\text{[Net Conduit Investment]}$$

110. We affirm the use of our proposed formula to determine the maintenance carrying charge rate element for LEC owned underground conduit systems.[345] Account 2441, which unlike Account 2411 (used as the gross pole investment to determine the net cost of a bare pole) includes no non-cable related investment that supports LEC operations exclusively and, consequently, does not require the application of an adjustment factor.[346] Telecommunications carriers and LEC commenters support our conclusion that

[342] 2 FCC Rcd 4387 (1987).

[343] *Multimedia Cablevision*, 11 FCC Rcd 11202 (1996).

[344] *Notice*, 12 FCC Rcd 7449, at Appendix C.

[345] MCI Comments at 23.

manhole costs included in Account 2441 are suitable for recovery as underground conduit system costs.[347]

ii. Electric Utility Owned Conduit

111. The formula and accounts to be used for the maintenance element of the carrying charge rate of the *Cable Formula* for electric utility conduit owners is determined by applying FERC accounts analogous to those LEC accounts used in *Multimedia Cablevision*, as follow:

$$\text{Maintenance Element} = \frac{\text{Account 594 (Maintenance of Underground Lines)}}{\left[\text{Investment in Accounts 366, 367, \& 369}\right] - \left[\text{Depreciation Related to Accounts 366, 367, \& 369}\right] - \left[\text{Deferred Income Taxes Related to Accounts 366, 367, \& 369}\right]}$$

112. FERC Account 366 contains capital costs for installed underground conduit and tunnels used for housing distribution cables or wires.[348] For electric utilities, Accounts 367 (Underground Conductors and Devices) and 369 (Services), and corresponding maintenance expenses are included in Account 594 (Maintenance of underground lines).[349] Some electric utilities suggest inclusion of Accounts 580 (Operation and Supervision), 584 (Operation of Underground Lines), 588 (Miscellaneous Distribution Operation Expenses), 590 (Maintenance Supervision and Engineering-Major Only), and 598 (Maintenance of Miscellaneous Distribution Plant).[350] Accounts 580, 584, 588 are operational accounts which report expenses relating to the utility's core business services and not pole attachments.[351] We have addressed inclusion of Account 590 above and do not include that account in the *Cable Formula* for poles.[352] Account 598 is a miscellaneous account related generally to maintenance of equipment on customer premises and is not associated with pole attachments in conduit.[353] We will not include any portion of Accounts 580, 584, 588, 590 or 598 in the denominator of the maintenance element because the costs or expenses reported to these accounts do not reflect "operating expenses and actual capital costs of the utility

[346] *Notice* at ¶ 42.

[347] *See, e.g.*, GTE Comments at 17 n.24; Sprint Comments at 10.

[348] 18 C.F.R. Part 101, Description of Accounts.

[349] *Id.*

[350] *See* Edison Electric/UTC Comments at 26; Carolina Power Comments at 68–75; Ohio Edison Comments at 42–45.

[351] 18 C.F.R. Part 101, Description of Accounts.

[352] *See* discussion at ¶¶ 61-65 of this *Order*.

[353] 18 C.F.R. Part 101, Description of Accounts.

attributable to the . . . conduit."[354]

b. Depreciation Element

113. In the *Notice*,[355] we proposed a formula to determine the depreciation element for conduit as follows:

$$\text{Depreciation Carrying Charge Factor} = \text{Depreciation Rate for Conduit} \times \frac{\text{Gross Conduit Investment (Part 32 Account 2441 / FERC Accounts 366, 367, 369)}}{\text{Net Conduit Investment}}$$

114. Consistent with our discussions and conclusions above, we are excluding FERC Accounts 367 and 369 from the numerator for this equation for electric utility conduit owners.[356] Therefore, only FERC Account 366 will be used as a basis for Gross Conduit Investment under the formula for electric utilities. For LECs, ARMIS Account 2441 represents the corresponding Gross Conduit Investment account under the formula. We adopt our proposed formula, as modified, as follows:

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (ARMIS Account 2441 / FERC Accounts 366)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

115. As required by the Regulatory Flexibility Act ("RFA"),[357] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice*.[358] The Commission sought written public comment on the proposals in the *Notice* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[359]

1. Need for, and Objectives of, the *Order*

[354] 47 U.S.C. § 224(d)(1).

[355] 12 FCC Rcd 7449 at Appendix C.

[356] *See* discussion regarding FERC Account 367 and 369 at ¶¶ 119-121 of this *Order*.

[357] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[358] *Notice of Proposed Rulemaking*, CS Docket No. 97-98, 12 FCC Rcd 7449, ¶¶ 49-79 (1997).

[359] *See* 5 U.S.C. § 604.

116. In 1987, the Commission adopted its current pole attachment formula for calculating the maximum just and reasonable rates utilities may charge cable systems for pole attachments. Since then the Commission replaced its accounting system for telephone companies, creating Part 32. This created a need to advise telephone companies about how the new system should be used in the pole attachment formula. The Telecommunications Act of 1996 made pole attachment rules applicable to telecommunications providers. The existing pole attachment formula applies to them until February 8, 2001. This gave rise to a need to ensure that the pole attachments rules would appropriately accommodate these new attachers. The use of conduit by cable systems and had not yet been addressed in detail by the Commission. This needs to be done in light of the anticipated number of new attachers whose entry into the marketplace the Commission wishes to facilitate. We recognize that a significant number of new attachers might be small businesses.

117. The objectives of the rules adopted herein are consistent with Congressional intent to provide a clear methodology to determine just and reasonable pole attachment rates in a manner that uses publicly available and verifiable data whenever possible. The objectives of the rules adopted herein change the formula methodology used to determine a just and reasonable pole attachment rate to reflect the present Part 32 accounting system for telephone companies that replaced the former Part 31 rules in 1988. Finally, the objectives of the rules adopted herein are to identify a conduit methodology that will determine the maximum just and reasonable rates utilities may charge cable operators and telecommunications carriers for pole attachments to conduit systems. Although our rules do not differentiate between large and small businesses, our use of presumptions and publicly available data in our methodology ensures that small businesses will not be discouraged from seeking recourse with the Commission against the imposition of unreasonable pole attachment rates.

2. Summary of Significant Issues Raised by Public Comments In Response to the IRFA

118. Small Cable Business Association ("SCBA") filed comments in response to the IRFA contained in the *Notice*, and, to the extent they are relevant to the issues in this proceeding, we incorporate them herein by reference.[360] SCBA claims in its IRFA comments that, because of the statutory exclusion of cooperatives from the definition of utility, Section 224 does not minimize market entry barriers for small cable operators.[361] According to SCBA, the IRFA in the *Notice* fails to consider this issue.[362] SCBA claims that small cable systems will be particularly hurt by the statutory exemption of cooperatives from

[360] *Cf.* discussion *infra* at ¶ 174. Section 224 only applies to utilities not excluded by the statute. Market entry barriers for small operators, seeking pole attachments to utility infrastructure over which Section 224 jurisdiction applies, will be minimized as we outline in ¶ 174.

[361] SCBA IRFA Comments at 2.

[362] *Id.*

the definition of utility because small cable systems often operate in rural areas and therefore necessarily attach their plant to rural telephone and electric cooperatives.[363] In its Reply to the SCBA's comments, the National Telephone Cooperative Association responded that " . . . the exemption [of cooperatives from Section] 224 does not deprive SCBA members of available legal remedies in connection with pole attachment agreements negotiated with exempt electric or telephone cooperatives."[364] We note that the SCBA does not appear to be claiming that our rules will disproportionately burden small cable systems, but that where our rules do not apply, small cable system operators will be disproportionately harmed. Because the exemption for cooperatives was set forth by Congress clearly in Section 224(a)(1), the Commission is left no discretion to address SCBA's concerns in this regard. In general comments, the National Cable Television Association ("NCTA") acknowledged that:

> The benefits [of the Commission's current pole attachment regulatory regime] are most vivid in the case of small cable operators. Small operators are peculiarly vulnerable to pole rent overcharges, because of the nature of their service areas. The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers. A pole rent increase creates an enormous push on [cable] rates, and frequently makes rural line extensions uneconomical. These same small operators are often the very parties without the budgets to litigate expensive document-intensive rate cases.[365]

The NCTA's comments recognize that the Commission's chosen methodology does not excessively burden small businesses.

3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

119. The RFA generally defines a "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[366] In addition, the term

[363]SCBA IRFA at 2.

[364]National Telephone Cooperative Association Reply at 2-3. A national association of approximately 500 local exchange carriers that provide service primarily in rural areas, the National Telephone Cooperative Association reports that its members are small local exchange carriers that are "rural telephone companies" as defined in the Telecommunications Act of 1996, and about half of its members are organized as cooperatives. *Id.* at 1.

[365]NCTA Comments at 5-6.

[366]5 U.S.C. § 601(6).

"small business" has the same meaning as the term small business concern under the Small Business Act.[367] A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[368] For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

a. Utilities

120. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of utility companies. Section 224 defines a "utility" as "any person who 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 who is cooperatively organized, or any person owned by the Federal Government or any State." The SBA has provided the Commission with a list of utility firms which may be effected by this rulemaking. Based upon the SBA's list, the Commission concludes that all of the following types of utility firms may be affected by the Commission's implementation of Section 224.

(1) Electric Utilities (SIC 4911, 4931 & 4939)

121. *Electric Services (SIC 4911).* The SBA has developed a definition for small electric utility firms.[369] The Census Bureau reports that a total of 1379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992.[370] The Census Bureau reports that 447 of the 1379 firms listed had total revenues below five million dollars.[371]

122. *Electric and Other Services Combined (SIC 4931).* The SBA has classified this entity as

[367]5 U.S.C. § 601(3) (incorporating by reference the definitions of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more 'definitions' of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

[368]Small Business Act, 15 U.S.C. § 632.

[369]Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987).

[370]13 C.F.R. § 121.201.

[371]U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA).

a utility whose business is less than 95% electric in combination with some other type of service.[372] The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.[373] The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars.[374]

123. *Combination Utilities, Not Elsewhere Classified (SIC 4939).* The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified.[375] The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did not exceed five million dollars in 1992.[376] The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.[377]

(2) Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

124. *Natural Gas Transmission (SIC 4922).* The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.[378] The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992.[379] The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars.[380]

125. *Natural Gas Transmission and Distribution (SIC 4923).* The SBA has classified this

[372] *See supra* note 369.

[373] 13 C.F.R. § 121.201.

[374] *See supra* note 371.

[375] *See supra* note 369.

[376] 13 C.F.R. § 121.201.

[377] *See supra* note 371.

[378] *See supra* note 369.

[379] 13 C.F.R. § 121.201.

[380] *See supra* note 371.

entity as a utility that transmits and distributes natural gas for sale.[381] The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues did not exceed five million dollars.[382] The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars.[383]

126. *Natural Gas Distribution (SIC 4924).* The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.[384] The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues did not exceed five million dollars in 1992.[385] The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars.[386]

127. *Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925).* The SBA has classified this entity as a utility that engages in the manufacturing and/or distribution of the sale of gas. These mixtures may include natural gas.[387] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues did not exceed five million dollars in 1992.[388] The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars.[389]

128. *Gas and Other Services Combined (SIC 4932).* The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.[390] The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992.

---

[381] *See supra* note 369.

[382] 13 C.F.R. § 121.201.

[383] *See supra* note 371.

[384] *See supra* note 369.

[385] 13 C.F.R. § 121.201.

[386] *See supra* note 371.

[387] *See supra* note 369.

[388] 13 C.F.R. § 121.201.

[389] *See supra* note 371.

[390] *See supra* note 369.

According to the SBA, a small gas and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.[391] The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars.[392]

(3) Water Supply (SIC 4941)

129. The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.[393] The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues did not exceed five million dollars in 1992.[394] The Census Bureau reported that 3065 of the 3169 firms listed had total revenues below five million dollars.[395]

(4) Sanitary Systems (SIC 4952, 4953 & 4959)

130. *Sewerage Systems (SIC 4952).* The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.[396] The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.[397] The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars.[398]

131. *Refuse Systems (SIC 4953).* The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."[399] The Census Bureau reports that a total of 2287 such firms were in operation for at least one year at the end

[391] 13 C.F.R. § 121.201.

[392] *See supra* note 371.

[393] *See supra* note 369.

[394] 13 C.F.R. § 121.201.

[395] *See supra* note 371.

[396] *See supra* note 369.

[397] 13 C.F.R. § 121.201.

[398] *See supra* note 371.

[399] *See supra* note 369.

of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues did not exceed six million dollars.[400] The Census Bureau reported that 1908 of the 2287 firms listed had total revenues below six million dollars.[401]

132. *Sanitary Services, Not Elsewhere Classified (SIC 4959).* The SBA defines these firms as engaged in sanitary services.[402] The Census Bureau reports that a total of 1214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firms gross revenues did not exceed five million dollars.[403] The Census Bureau reported that 1173 of the 1214 firms listed had total revenues below five million dollars.[404]

(5) Steam and Air Conditioning Supply (SIC 4961)

133. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.[405] The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues did not exceed nine million dollars.[406] The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars.[407]

(6) Irrigation Systems (SIC 4971)

134. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.[408] The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues did not exceed five million dollars.[409] The Census Bureau reported that 286 of the 297 firms

[400] 13 C.F.R. § 121.201.

[401] *See supra* note 371.

[402] *See supra* note 369.

[403] 13 C.F.R. § 121.201.

[404] *See supra* note 371.

[405] *See supra* note 369.

[406] 13 C.F.R. § 121.201.

[407] *See supra* note 371.

[408] *See supra* note 369.

[409] 13 C.F.R. § 121.201.

listed had total revenues below five million dollars.[410]

b. Telephone Companies (SIC 4813)

135. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies. The SBA has defined a small business for SIC code 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it has no more than 1500 employees.[411] The Census Bureau reports that, at the end of 1992, there were 3497 firms engaged in providing telephone services, as defined therein, for at least one year.[412] This number contains a variety of different categories of carriers, including local exchange carriers ("LECs"), interexchange carriers ("IXCs"), competitive access providers ("CAPs"), cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications service ("PCS") providers, covered SMR providers and resellers. Some of those 3497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[413] We therefore conclude that fewer than 3497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this *Order*. Below, we estimate the potential number of small entity telephone service firms or small incumbent LEC's that may be affected by the rules adopted herein in this service category.

(1) Wireline Carriers and Service Providers

136. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2321 such telephone companies in operation for at least one year at the end of 1992.[414] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1500 persons.[415] Of the 2321 non-radiotelephone companies listed by the Census Bureau, 2295 were reported to have fewer than 1000 employees. Thus, at least 2295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs, or small entities based on these employment statistics. Although some of these carriers are likely not independently owned and operated,

[410] *See supra* note 371.

[411] 13 C.F.R. § 121.201.

[412] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("*1992 Census*").

[413] 15 U.S.C. § 632(a)(1).

[414] *1992 Census, supra* at Firm size 1-123.

[415] 13 C.F.R. § 121.201.

we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions or rules adopted in this *Order*.

(2) Local Exchange Carriers

137. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813).[416] The most reliable source of information regarding the number of LECs nationwide appears to be the data that the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service ("TRS"). According to "*TRS Worksheet*" data released in November 1997, there are 1371 companies reporting that they categorize themselves as LECs.[417] Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1371 small incumbent LECs that may be affected by the rules adopted herein.

(3) Interexchange Carriers

138. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.[418] Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rules adopted in this *Order*.

(4) Competitive Access Providers

139. Neither the Commission nor SBA has developed a definition of small entities specifically

[416] *Id.*

[417] Federal Communications Commission, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) ("*TRS Worksheet*" data).

[418] TRS Worksheet.

applicable to providers of competitive access services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.[419] Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rules adopted herein.

(5) Cellular Service Carriers

140. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. The *TRS Worksheet* places cellular licensees and Personal Communications Service ("PCS") licensees in one group. According to the most recent data, there are 804 carriers reporting that they categorize themselves as either PCS or cellular carriers.[420] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by the decisions and rules adopted in this *Order*.

(6) Mobile Service Carriers

141. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.[421] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently,

[419] *Id.* This *TRS Worksheet* category also includes Competitive Local Exchange Carriers ("CLECs").

[420] *Id.*

[421] *Id.*

we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by the decisions and rules adopted in this *Order*.

(7) Broadband Personal Communications Services ("PCS") Licensees

142. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[422] These regulations defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.[423] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. A total of 93 small and very small business bidders won approximately 40% of the 1479 licenses for Blocks D, E, and F.[424] However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules. We note that the *TRS Worksheet* data track PCS licensees in the reporting category "Cellular or Personal Communications Service Carrier." As noted *supra* in the paragraph regarding cellular carriers, according to the most recent data, there are 804 carriers reporting that they place themselves in this category.

(8) Specialized Mobile Radio ("SMR") Licensees

143. Pursuant to 47 C.F.R. §§ 90.814(b)(1) and 90.912(b)(1), the Commission has defined small entity in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a small entity in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[425] The

[422] *See Report and Order* (Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, FCC 96-278 (1996) at ¶ 60, 61 FR 33859 (July 1, 1996).

[423] *See Fifth Report and Order* (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding), PP Docket No. 93-253, 9 FCC Rcd 5532, 5581-84 (1994).

[424] FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (*rel.* January 14, 1997).

[425] *See Second Order on Reconsideration and Seventh Report and Order* (Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool), PR Docket No. 89-583, 11 FCC

rules adopted in this *Order* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities which may be affected by the decisions and rules adopted in this *Order*. We note that the *TRS Worksheet* data track SMR licensees in the reporting category "Paging and Other Mobile Carriers." According to the most recent data, there are 172 carriers, including SMR carriers, reporting that they place themselves in this category.

144. In April 1997, the Commission held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders that qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of 900 MHz geographic area SMR licensees affected by the rules adopted in this *Order* includes these 60 small entities. In December 1997, the Commission also held auctions for the 525 licenses for the upper 200 channels in the 800 MHz SMR band. There were 10 winning bidders that qualified as small entities in that auction. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the rules adopted in this *Order* also includes these 10 small entities. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1000 employees and that no reliable estimate of the number of prospective 800 MHz licensees for the lower 230 channels can be made, we conclude, for purposes of this FRFA, that some or all of the licenses could conceivably be awarded to small entities that may be affected by the decisions and rules adopted in this *Order*.

(9) Resellers

145. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.[426] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rules adopted in this *Order*.

Rcd 2639, 2693-702 (1995); *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking* (Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band), PR Docket No. 93-144, 11 FCC Rcd 1463 (1995).

[426]TRS Worksheet.

c. Wireless (Radiotelephone) Carriers (SIC 4812)

146. Pursuant to the terms of the 1996 Act, wireless carriers are entitled to affix their equipment to utility poles with rates consistent with the Commission's rules discussed herein. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1176 such companies in operation for at least one year at the end of 1992.[427] According to SBA's definition, a small business radiotelephone company is one employing no more than 1500 persons.[428] The Census Bureau also reported that 1164 of those radiotelephone companies had fewer than 1000 employees. Thus, even if all of the remaining 12 companies had more than 1500 employees, there would still be 1164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1164 small entity radiotelephone companies that may be affected by the rules adopted herein.

d. Cable System Operators (SIC 4841)

147. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually.[429] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1423 such cable and other pay television services generating less than $11 million in revenue.[430]

148. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[431] Based on our most recent information, we estimate that there were

[427] *See* 1992 Census.

[428] 13 C.F.R. § 121.201.

[429] 13 C.F.R. § 121.201.

[430] *See supra* note 369.

[431] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration* (Implementation of Sections of the 1992 Cable Act: Rate Regulation), 10 FCC Rcd 7393.

1439 cable systems that qualified as small cable system operators at the end of 1995.[432] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable systems. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Order*.

149. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[433] The Commission found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[434] Based on available data, we find that the number of cable systems serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable systems under the definition in the Communications Act.

e. Municipalities

150. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."[435] There are 85,006 governmental entities in the United States.[436] This number includes such entities as states, counties, cities, utility districts and school districts. We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments pursuant to Section 224(c)(1). Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

[432]Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[433]47 U.S.C. § 543(m)(2).

[434]47 C.F.R. § 76.1403(b).

[435]5 U.S.C. § 601(5).

[436]United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

151. The rules adopted in this *Order* may require a change in certain recordkeeping requirements for conduit systems. A utility will now have to maintain specific records relating to the number of linear meters, or feet, of conduit for the purpose of determining the net cost of conduit and the amount of conduit linear measurement in which a pole attachment exists. Although this requirement affects both large and small businesses equally, we believe that through the use of presumptions, specific accounts and publicly available data in our methodology, we have avoided a more extensive regulatory scheme which might have burdened small entities. We conclude that our rules will not disproportionately burden small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

152. Section 703 of the 1996 Act amended Section 224 in several important ways to provide access to and rate regulation for pole attachments by cable operators and telecommunications carriers in order that they might compete in the market place to provide their respective services. The 1996 Act established a pole attachment rate methodology for telecommunications carriers that would not become effective until February 8, 2001. Until that time, pole attachments by telecommunications carriers will be regulated in the same manner as pole attachment rates for cable operators under Section 224(d). Prior to the 1996 Act, access to pole attachments was available only to cable operators and only under their franchise pursuant to Section 621. With the legislative expansion of access and rate regulation, small entities have greater opportunity to develop the infrastructure necessary to compete in the cable and telecommunications marketplaces. We have been mindful to maintain simplicity whenever possible, and to provide methodologies consistent with availability to publicly verifiable data. In the *Notice,* we sought comment to re-evaluate the formula methodologies used or proposed, to update our rules for accounting used in the formulas, and to provide a methodology for determining just and reasonable rates for pole attachments in conduit.

153. In accordance with the RFA, the Commission has endeavored to minimize significant impact on small entities. To minimize the burden on utility pole owners, including those that qualify as small entities, and to promote certainty and efficiency in determining the pole attachment rate for cable operators and telecommunications carriers, we have maintained our formula presumptions, including our one-foot presumption of space occupied by a pole attachment, and the presumptive amount of usable space on a pole.[437] We have adopted a conduit methodology based on publicly available data and a half-duct presumption of capacity occupied by a pole attachment in a conduit system, to simplify the process of determining a just and reasonable pole attachment rate and to provide certainty for small entities preparing to enter the competitive marketplace. We have formalized the use of part 32 accounting for LECs. We have consolidated all formula elements, and accounts specified for use in the formulas, in this one document in order to provide ease of application by all parties.

[437] *See* Section V.A above.

154. **Report to Congress:** The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

155. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this *Order*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

156. As stated above, written comments by the public on the modified information collection requirements are due 60 days from date of publication of this *Order* in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

IX. ORDERING CLAUSES

157. IT IS ORDERED that, pursuant to Sections 1, 4(i), 224 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 224 and 303(r), the Commission's rules are hereby amended as set forth in Appendix A.

158. IT IS FURTHER ORDERED that Section 1.1402 of the Commission's rules, as amended in Appendix A hereto, will become effective 30 days after the date of publication of this *Report and Order* in the Federal Register, and that Sections 1.1404 and 1.1409 of the Commission's rules, as amended in Appendix A hereto, will become effective 140 days after the date of publication of this *Report and Order* in the Federal Register, unless the Commission publishes a notice before that date stating that the Office of Management and Budget ("OMB") has not approved the information collection requirements contained in the rules.

159. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory

Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Revised Rules

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 — PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r) and 309.

2. Amend § 1.1402 to revise paragraphs (c), (i), (j) and (l) and add paragraph (n) to read as follows:

§ 1.1402 Definitions.

* * * * *

(c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

* * * * *

(i) The term conduit means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term conduit system means a collection of one or more conduits together with their supporting infrastructure.

* * * * *

(l) With respect to poles, the term unusable space means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

* * * * *

(n) The term inner-duct means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

* * * * *

3. Amend § 1.1404 to remove paragraph (k), and redesignate old paragraphs (l) (m) and (n) as (k), (l), and (m), respectively; revise the first sentence of paragraph (g), paragraphs (g)(10), (g)(13), the last (unnumbered) paragraph of paragraph (g); revise paragraph (h); and revise paragraph (j), to read as

follows:

§ 1.1404 Complaint.

* * * * *

(g) For attachments to poles, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. * * *

* * * * *

(10) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return.

* * * * *

(13) Reimbursements received from CATV operators and telecommunications carriers for non-recurring costs; and

Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

* * * * *

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable:

(1) The gross investment by the utility for conduit;
(2) The accumulated depreciation from the gross conduit investment;
(3) The system duct length or system conduit length and the method used to determine it;
(4) The length of the conduit subject to the complaint;
(5) The number of ducts in the conduit subject to the complaint;
(6) The number of inner-ducts in the duct occupied, if any. If there are no inner-ducts, the attachment is presumed to occupy one-half duct.
(7) The annual carrying charges attributable to the cost of owning conduit. These charges may be expressed as a percentage of the net linear cost of a conduit. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of

accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes.

(8) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return; and

(9) Reimbursements received by utilities from CATV operators and telecommunications carriers for non-recurring costs; and

Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

* * * * *

(j) ***A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier.***

(k) The complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless.

(l) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(m) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint shall be filed within 30 days of such denial. In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

* * * * *

4. Amend § 1.1409 to revise paragraph (e)(1); add new paragraph (e)(3) and redesignate old paragraph (e)(3) as paragraph (e)(4); and revise paragraph (f) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(e) * * *

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

* * * * *

(3) The following formula shall apply to attachments to conduit by cable operators providing cable services. This formula shall also apply to attachments to conduit by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \underbrace{\left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\text{No. of Ducts} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \text{Carrying Charge Rate}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be ½.

(4) Subject to paragraph (f) the following formula shall apply to pole attachments within a conduit system beginning on February 8, 2001:

Maximum Conduit Rate = Conduit Unusable Space Factor + Conduit Usable Space Factor

For purposes of this formula, the conduit unusable space factor, as defined under Section 1.1417(c), and the conduit usable space factor, as defined under Section 1.1418(c), shall apply to each linear foot occupied.

(f) Paragraphs (e)(2) and (e)(4) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that result from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to

apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

APPENDIX B
List of Commenters

Note: If no abbreviation appears in parentheses following the full name of the party, the full name is used in this *Order*.

Comments in CS Docket No. 97-98

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric)
Ameritech
Association for Local Telecommunications Services
AT&T Corp. (AT&T)
Bell Atlantic & NYNEX (Bell Atlantic/NYNEX)
BellSouth Corporation (BellSouth)
Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company and Virginia Power, including North Carolina Power (Carolina Power)
Consolidated Edison Company of New York, Inc. (ConEd)
Duquesne Light Company (Duquesne Light)
Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)
GTE Service Corporation (GTE)
MCI Telecommunications Corporation (MCI)
National Cable Television Association, Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)
Ohio Edison Company (Ohio Edison)
Public Service Company of New Mexico (Public Service of New Mexico)
SBC Communications Inc. (SBC)
Small Cable Business Association (SBCA)
Southeastern Indiana Rural Electric Membership Cooperative (Southeastern Indiana REMC)
Southern New England Telephone Company (SNET)
Sprint Local Telephone Companies (Sprint)
Tele-Communications, Inc. (TCI)
Time Warner Cable (Time Warner)
Union Electric Company (Union Electric)
United States Telephone Association (USTA)
U S West, Inc. (U S West)
WorldCom, Inc. (WorldCom)

Reply Comments in CS Docket No. 97-98

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Florida Power and Light Company (American Electric)
Ameritech
AT&T Corp. (AT&T)
Bell Atlantic & NYNEX (Bell Atlantic/NYNEX)
Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company and Virginia Power, including North Carolina Power (Carolina Power)
Chugach Electric Association (Chugach)
Edison Electric Institute and UTC, the Telecommunications Association (Edison Electric/UTC)
GTE Service Corporation (GTE)
KMC Telecom Inc. (KMC Telecom)
MCI Telecommunications Corporation (MCI)
National Cable Television Association, Cable Telecommunications Association, Texas Cable & Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Mississippi Cable Telecommunications Association, Mid-America Cable Telecommunications Association, Kansas Cable Telecommunications Association, Jones Intercable, Inc., Charter Communications, Greater Media, Inc., Prime Cable, Rifkin & Associates, TCA Cable TV, Inc., and The Helicon Corporation (NCTA)
National Telephone Cooperative Association
Qwest
SBC Communications Inc. (SBC)
Tele-Communications, Inc. (TCI)
Time Warner Cable (Time Warner)
United States Telephone Association (USTA)
U S West, Inc. (U S West)
WorldCom, Inc. (WorldCom)

Ex Parte Communications by Parties Not Previously Filing Comments
New England Electric Systems (NEES)

APPENDIX C - 1
Pole Attachment Formulas (Poles) For
Local Exchange Carrier (LEC) Pole Owners
Using FCC ARMIS Part 32 Accounts

$$\textbf{Maximum Rate per Pole} = \frac{\textbf{Space Occupied}}{\textbf{Usable Space}} \times \frac{\textbf{Net Pole Investment}}{\textbf{Total Number of Poles}} \times 0.95 \times \textbf{Carrying Charge Rate}$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Usable Space = 13.5 feet (presumed, but rebuttable)

$$\textbf{Net Pole Investment} = \text{Gross Pole Investment (Account 2411)} - \text{Accumulated Depreciation (Account 3100)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 4100+4340)(Poles)}$$

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100+4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 6411} - \text{Rental Expense (Poles)}}{\text{Net Pole Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 2411)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default} = 11.25\%)$$

Appendix C - 2
Pole Attachment Formulas (Poles) For
Electric Utility Pole Owners Using FERC Part 101 Accounts

$$\textbf{Maximum Rate per Pole} = \frac{\textbf{Space Occupied}}{\textbf{Usable Space}} \times \frac{\textbf{Net Pole Investment}}{\textbf{Total Number of Poles}} \times 0.85 \times \textbf{Carrying Charge Rate}$$

Where:

Space Occupied = 1 foot (presumed, but rebuttable)

Usable Space = 13.5 feet (presumed, but rebuttable)

Net Pole Investment = Gross Pole Investment (Account 364) − Accumulated Depreciation (Account 108)(Poles) − Accumulated Deferred Income Taxes (Account 109)(Poles)

Carrying Charge Rate = Administrative + Maintenance + Depreciation + Taxes + Return

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (FERC Form 1, p. 323, line 168, col. b.)}}{\text{Gross Plant Investment (FERC Form 1, p. 200, col. b)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 593}}{\text{Pole Investment in Accounts 364, 365, \& 369} - \text{Depreciation (Poles) Related to Accounts 364, 365, \& 369} - \text{Accumulated Deferred Income Taxes related to Accounts 364, 365, \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 364)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Accounts } 408.1 + 409.1 + 410.1 + 411.4 - 411.1}{\text{Gross Plant Investment (FERC Form 1, p. 200, col. b)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default} = 11.25\%)$$

APPENDIX C -3
Pole Attachment Formulas (Conduit) For
Local Exchange Carrier (LEC) Conduit Owners
Using FCC ARMIS Part 32 Accounts

$$\textbf{Maximum Rate} = \textbf{Percentage of Conduit Capacity Occupied} \times \textbf{Net Linear Cost of Conduit} \times \textbf{Carrying Charge Rate}$$

Where:

$$\textbf{Percentage of Conduit Capacity Occupied} = \frac{1}{\text{Number of Inner Ducts } (\geq 2)} \times \frac{1}{\text{Number of Ducts in Conduit}}$$

$$\textbf{Net Linear Cost of Conduit} = \text{Number of Ducts in Conduit} \times \frac{\text{Net Conduit Investment}}{\text{Total Conduit System Duct Length (ft. or m.)}} \quad \text{OR} = \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}}$$

$$\text{Net Conduit Investment} = \text{Gross Conduit Investment (Account 2441)} - \text{Accumulated Depreciation (Account 3100)(Conduit)} - \text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Conduit)}$$

$$\textbf{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative Expenses (Accounts 6710 \& 6720)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Conduit Maintenance Expense (Account 6441)}}{\text{Net Conduit Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100 + 4340)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default} \equiv 11.25\%)$$

APPENDIX C - 4
Pole Attachment Formulas (Conduit) For Electric Utility Conduit Owners Using FERC Part 101 Accounts

$$\textbf{Maximum Rate} = \textbf{Percentage of Conduit Capacity Occupied} \times \textbf{Net Linear Cost of Conduit} \times \textbf{Carrying Charge Rate}$$

Where:

$$\textbf{Percentage of Conduit Capacity Occupied} = \frac{1}{\text{Number of Inner Ducts } (\geq 2)} \times \frac{1}{\text{Number of Ducts in Conduit}}$$

$$\textbf{Net Linear Cost of Conduit} = \text{Number of Ducts in Conduit} \times \frac{\text{Net Conduit Investment}}{\text{Total Conduit System Duct Length (ft. or m.)}} \quad \text{OR} = \frac{\text{Net Conduit Investment}}{\text{Total Length of Conduit in System}}$$

$$\text{Net Conduit Investment} = \text{Gross Conduit Investment (Account 366)} - \text{Accumulated Depreciation (Account 108)(Conduit)} - \text{Accumulated Deferred Income Taxes (Account 109)(Conduit)}$$

$$\textbf{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative Expenses (FERC Form 1, p. 323, line 168, col. b)}}{\text{Gross Plant Investment (FERC Form 1, p. 200, col. b)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 594}}{\text{Conduit Investment in Accounts 366, 367, \& 369} - \text{Depreciation (Poles) in Accounts 366, 367, \& 369} - \text{Accumulated Deferred Income Taxes related to Accounts 366, 367, \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 366)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Accounts } 408.1 + 409.1 + 410.1 + 411.4 - 411.1}{\text{Gross Plant Investment (FERC Form 1, p. 200, col. b)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190)}}$$

$$\text{Return Element} = \text{Applicable Rate of Return (default} \equiv 11.25\%)$$