BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PROPOSED RULEMAKING TO ADOPT A METHODOLOGY FOR DETERMINATION OF JUST AND REASONABLE RATES FOR ATTACHMENT TO TRANSMISSION FACILITIES	Docket No. UT-970723 TCI BRIEFING PAPER FOR WORKSHOP December 3, 1997

General Approach

There is a general consensus that the Commission should adopt a specific methodology for determining just and reasonable pole rents. Most comments support adopting the FCC formula in whole or in part. All of the comments support using a formula based on the concepts of usable space and pole height as set forth in the FCC formula. Among the benefits of adopting such a formula are:

- providing a basis for informing private negotiations
- promoting a pro-competitive environment
- eliminating uncertainties which have precipitated prior rate complaints
- establishing regulations which are flexible enough (through rebuttable presumptions) to account for any variations in local circumstances

RMS FOB

Threshold Clarifications

There are certain misunderstandings reflected in the comments.

First, the term "transmission facilities" is not intended to limit the scope of this rulemaking to support structures for >60kV facilities. It is intended to cover distribution poles, transmission poles, and, to the extent desired by the UTC, conduits and ducts. It is correct that the standard formula refers to FERC accounts for distribution poles. One could apply the same formula to transmission poles with some minor conversions. For example, transmission pole investment is recorded in Account 355 rather than Account 364, and the pole count is separately recorded. In addition, he height of transmission towers, and therefore the useable space, is much greater on transmission towers compared with distribution poles. In practice, parties are generally provided attachments to *transmission* poles under the FCC formula for *distribution* pole rental, subject to the right of the utility to recalculate a specific rate for transmission towers. This is because the increased net investment in towers is more than offset by the decrease in the ratio between the 1 foot of space used compared with the far greater usable space on a transmission tower.[1]

[1]*Teleprompter Corp. v. Alabama Power Co.*, PA-81-0014, Mimeo No. 33976 (November 3, 1983) (transmission poles are more costly than distribution poles, but transmission poles are taller and therefore the total usable space is greater than the 13.5 feet on distribution poles. Utility may offer recalculation based on these factors.)

Second, Washington Water Power has suggested that the FCC formula relies extensively on internal or special accounting. This is not correct. Except for an electric utility's count of the number of poles in its continuing property records, the rate may be calculated using existing published data. Utilities which file a FERC Form 1 using only multi-state data are encouraged to produce a state-specific Form 1. However, where there are only minor extensions into another state, the parties (and the agency) may rely on the multi-state data.[2]

Third, Washington Water Power has also suggested that it is premature to adopt the FCC formula because the FCC is considering changes to it. At present, this Commission has not perfected its jurisdiction over poles because it has not adopted the specific methodology required under federal law and FCC rules. Perfecting that jurisdiction is essential in order to provide a genuine forum for resolving complaints. Although we do not anticipate major changes from the FCC in its formula, there are two expeditious methods for addressing such changes. One, which we recommend, is to consider changes if and when they occur, but to rely upon the present formula for the present. Another is to adopt the FCC regime, including such amendments automatically as they occur, as the New York Commission did.[3] There is no reason to avoid the issue while awaiting for perfect finality in an imperfect world.

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[2] *Beckley Telecable v. Appalachian Power Company*, 48 R.R.2d 444 (1980), PA-79-0006, Mimeo No. 36295 (September 30, 1980).

[3] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 at 11 (Issued and effective June 17, 1997)

Net Investment in Poles

Cost. RCW 80.54.040 requires setting pole rents based on "actual capital and operating expenses." The same terms in the federal act were construed to mean embedded (depreciated book) costs by the FCC.[4] Some comments suggest that this should be read to be TELRIC costs. The FCC rejected such cost theories when setting the current formula. No certified state calculates pole rate base on a reproduction-cost basis. Instead, reproduction costing has been affirmatively rejected in California,[5] Michigan[6] and New York,[7] after the utilities proffered $30 pole rents based on reproduction costs.

As detailed in Attachment A, any conceivable justification for setting prices on the basis of reproduction costs is entirely absent when dealing with pole attachments. There is no market within which such pricing could operate. The premise of utility regulation is to

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[4] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 65-66 (May 23, 1979) ("With regard to the argument advanced . . . that replacement costs should be taken into account in determining pole attachment rates, we do not consider such costs to be reflective of actual costs incurred. We believe historical costs most accurately reflect actual or embedded costs.").

[5] Cal. Pub. Util. Code §767.5 (Deering 1996) ("The basis for computation of annual capital costs shall be historical capital costs less depreciation.").

[6] *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending, Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (Ex. 1 to Initial Comments of NCTA, *et al.*).

[7] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 at 11 (Issued and effective June 17, 1997)

extend the economies of joint use to all customers. By franchise and local law, cable operators are captives on the pole plant, and do not face a "build or lease" option. No price signalling is required. Under the FCC formula, cable operators use only what they need for their particular service requirements, which in most cases is one foot or less of space. Even if cable operators *were* to somehow overconsume pole space, utilities are never at risk to overinvest in pole plant because cable operators pay all the upfront modification and pole replacement costs associated with the attachment of their facilities. The utilities set poles for their own use, or they would not be included in the core business rate base. We also note that the utilities themselves routinely use embedded costs for pole attachments and for competitive markets. Embedded costs provide the basis for how they set financial arrangements with telephone utilities under joint-use agreements. They also insist on using embedded costs to secure higher rates and returns on their investment, particularly for stranded investment and for failed (primarily nuclear) construction projects.[8] The current formula contains a panoply of forward looking elements: future salvage, generous depreciation, normalized taxes, returns which attract capital, and annual, simple updates which pick up all current costs. Given the pro-competitive success fostered by the current formula, pole rates should continue to be calculated on an embedded-cost basis.

[8] Benjamin A. Holden, *Electric-Deregulation Machine Starts To Pick Up Steam*, Wall Street Journal, July 14, 1997, at B.4.

GTE suggests that the net investment be calculated against gross investment. This has been rejected by the FCC because it provides for a return on investment which has already been recovered through depreciation. An "all gross" regime would also fail to account for makeready (which is recorded in the accumulated depreciation reserve).

Negative net rate base. US West has raised a concern over a minor anomaly which Southwestern Bell Telephone first encountered in 1994 but which is not evident in Washington. The anomaly arises if a utility is carrying poles as a negative rate base item, which in turn arises from an extremely aggressive accounting for "negative net salvage," discussed in Attachment B. Cash flow is maximized if "negative net salvage" is increased. But if actual retirements do not match projections, the rate base becomes negative. A correction has been proposed by the FCC to be used in those rare cases where the anomaly is encountered. The correction is to calculate depreciated book without reference to the accumulated depreciation associated with negative net salvage, and then to remove the return and tax component associated with amounts previously recovered through the enhanced depreciation charge. If the utility is unable to provide all of the necessary depreciation records from which the accumulated negative net salvage could be unbundled from historic recovery of original cost, the pole rate should remain at the level it was for the last year that the rate base remained positive.

Useable Space. Under the FCC formula, the maximum pole rate permitted is one derived by dividing a pole into "usable" space, defined as all space above minimum grade, including the so-called "neutral zone"; and the "unusable" space. The parties are directly assigned a proportion (and cost) of "usable" space based upon their own space needs. The costs of the "nonuseable" portion of the pole, that is, the ground set and minimum grade clearance, are assigned in proportion to the assignment of direct costs. For example, if a pole had 20 feet of "usable space," the direct and indirect costs of the pole would be assigned to cable in the ratio of the one foot assigned to cable to the 20 feet of usable space. Implicitly, this methodology assigns pole costs to parties in proportion to the use to which they put the useable space. If a telephone company occupied two feet of usable space, an electrical utility occupied seventeen feet, and a cable operator occupied one foot, they would be assigned pole costs in direct proportion to that use.

While many parties note the validity of the FCC's rebuttable presumptions on usable space, some intimate that alternatives should be considered. In all cases, the FCC allocator (1/13.5 on a 37.5 avearge pole) serves as a rebuttable presumption, which may be modified to account for local factors (e.g., taller poles with more usable space, or shorter poles with less). But the suggestions that a different allocator be used appear to have arisen through errors.

GTE initially indicates an agreement with the FCC's figures but later suggest that the UTC revisit the allocation of the "safety" space. The FCC's figures treat safety space as part of the useable space to be apportioned among all parties, for reasons which are detailed in Attachment C and which have been repeatedly reaffirmed.

Pacificorp and GTE suggest that the formula to be applied *today* should be the telecommunications rate which under federal law would be phased in for telecommunications attachments from 2001-2006. The current FCC formula is applied today to both cable operators and to telecommunications carriers. It allocates the cost of both the useable and nonuseable space in proportion to the amount of useable space which cable occupies. Electric utilities had asked Congress to allocate costs of the nonuseable space equally among attaching parties. The Congress compromised in 1996, and requires the FCC to develop a use ratio which assigns the costs of useable space proportionately as under the current formula, but which apportions two-thirds of the cost of nonuseable space equally among attaching parties when the attachment is used *for services other than cable television.*

Even under the federal model, the telecommunications rate does not govern until 2006. For five years, the current formula applies to all attachments. The rate produced by the new formula is to be phased in in equal annual increments from 2001 through 2006. Applying that formula to cable television today would defeat two key elements of the federal formula.

First, the 1996 Federal Telecommunications Association deliberately postponed the rate until 2006. The FTA provides a 5 year window for the deployment of telecommunication facilities at the rents computed under the FCC formula, and then a phase in thereafter, in order to avoid the drag on innovation and deployment which high pole rents would cause in the interim. The phase in was in anticipation that cable operators or CLECs attempting to compete with ILECs would need a significant period of time to gain a market footing and pay the additional rents. No party offers any basis for shortening the phase in.

Second, the telecommunications pole rent is intended to apply only to telecommunications vendors. The 1996 FTA model assures nondiscrimination by setting telecommunication pole rents at the lower cable rate, in order to provide nondiscriminatory deployment of both cable and CLEC lines during the next 5 years.

It is well within the rights of States to be even more procompetitive. For example, Michigan adopts the current FCC pole rate formula for any pole owner engaged in telecommunications, in order to promote competition.

Counting attachments. GTE suggests that once a cable operator offers any telecommunication services (anywhere?) then all of its attachments become telecommunications attachments. This is not grounded in reality. A cable operator might route telecommunications

(e.g., bypass to a POP) over a discrete route involving a mile of poles. This would not convert every pole everywhere into a telecomm pole.

WITA asks whether multiple strands within one sheath are one or more contacts. Just as multiple frequencies within a coaxial cable are not considered multiple attachments (even when leased for third party programming), multiple fibers within a sheath have never been considered more than one attachment. In fact, so long as communications conductors (e.g., fiber, coaxial truck, coax feeder) are lashed to a single support strand, they are treated as one attachment.[9] What a cable operator physically attaches to the pole is not usually the coaxial cable itself, but a wire support strand attached to the pole with a clamp and through bolt. The operator then places communications conductors on the strand and secures them by wrapping the strand and the conductor(s) with a thin filament applied by a lashing machine. Through the life of the plant, the communications conductors are then periodically altered. Deteriorated coaxial cables may be replaced. The bandwidth of the system may be increased electronically -- that is, more channels may be offered -- by installing new (strand-mounted) amplifiers which electronically propagate more signal through the conductors. New neighborhoods may be served by lashing additional or rerouted trunk cables to the existing strand, using another filament lashing the new line to the existing strand. This is the process called "overlashing." In today's

[9]*Heritage Cablevision Associates of Dallas, L.P., and Texas Cable TV Association, Inc. v. Texas Utilities Electric Company*, 8 FCC Rcd 373 (1993) ("The support strand is attached to the pole at only one point. The number of cables that are strung along that strand does not affect the total usable space required by the pole attachment.")

applications, fiber optic sheath may be "overlashed" to the coaxial cables in order to increase bandwidth and to provide capacity to offer new services. In practical effect, overlashing does not use more pole space, but there is often a temptation for pole owners to attempt to restrict overlashing, or to delay it while their own affiliates upgrade in order to provide those same services. The FCC has warned utilities not to succumb to these temptations.[10]

Procedures

Many parties express a preference for private agreements, with which TCI generally concurs. However, the UTC must take care to protect its jurisdiction to resolve complaints. The best process prefers negotiations, but it does not mistake coerced contracts for waivers. Utilities will often refuse to negotiate significant terms in pole attachment agreements, and will seek to impose unjust rates and terms when attachments are time critical. Some will freeze CLECs and cable operators in place by blocking repairs to underground facilities or by freezing existing services in place.[11] Some seek waivers of recourse as a pre-condition to

[10] In 1995, the Common Carrier Bureau issued a warning to pole owners in response to informal complaints that "utility pole owners may be unreasonably preventing cable operators from 'overlashing' fiber to their existing lines," and noted "that there could be serious anticompetitive effects from preventing cable operators from future adding fiber to their systems." *Public Notice, Common Carrier Bureau Cautions Owners of Utility Poles*, DA 95-35, Mimeo 51600 (CCB Jan. 11, 1995).

[11] *See, e.g. Multimedia Cablevision, Inc. v. Southwestern Bell Telephone,* 11 F.C.C.R. 11,202, Complaint ¶¶ 8-13 (Sept. 3, 1996) (utility refusal to process permit applications for cable service expansion upon learning that certain excess capacity could be used for two-way communications); TCG Dallas v. Texas

attachment,[12] a practice that the FCC has found "unreasonable *per se* and unenforceable as a matter of law."[13] The FCC has always recognized that these are contracts of adhesion and that regulatory oversight is essential to the fulfillment of public policy, whether or not a contract professes to contain such waivers.[14]

We therefore disagree with GTE's suggestion that a rate is presumed to be reasonable if the attaching party has been paying that rate, or a higher one, without filing a complaint for a 12-month period.[15] This rule would fail to account for such important considerations as payments made while new networks are being built out—when an attaching party is at its most vulnerable stage. It fails to account for annual decreases in the utility pole owner's costs and expense factors, which are supposed to be flowed through but often do not come to the attention of an operator until a separate concern arises. Likewise, the suggestion that a complaint must meet a threshold minimum amount of attachments is without merit because

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Utils. Elec. Co., Inc., No. 4:97CV51 (E.D. Tx. Feb. 26, 1997) (diversified electric utility attempts to deny CLEC access to conduit to repair fiber unless CLEC transfers title of CLEC fiber optic facilities to electric utility.)

[12] *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc. et al.*, PA No. 97-005 (Complaint filed July 9, 1997).

[13] Letter to Danny E. Adams from Meredith Jones, Jan. 17, 1997.

[14] *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, Mimeo 1636 (Jan. 8, 1985), *rev. denied*, FCC 85-257 (May 17, 1985); *TeleCable Development Corp. d/b/a Wytheville TeleCable, et al. v. Appalachian Power Co.*, 48 RR 2d 684, File Nos. PA-79-0007, PA-79-0009. PA-79-0055, PA-80-0002 (Oct. 31, 1980).

[15] SBC Comments at 42.

it could preclude small cable companies from availing themselves of the Commission's complaint resolution procedures.

GTE has also suggested that no complaint be entertained unless a utility is first provided with a Notice of Intent to file. We have found that no "Notice of Intent" is required in the pole area. During the course of pre-complaint efforts to resolve cases, most issues are identified and then advanced in the complaint. An extra step serves primarily to delay resolution, which may have an adverse effect on refunds, orders compelling timely access, or other remedies.

Market value

Puget Sound Energy and Washington Water Power suggest that utilities be permitted to charge market value. Poles are essential facilities for the provision of cable and competitive telecommunications services because there are no reasonable alternatives to attachments to utility poles. This is the conclusion of Congress, the U.S. Supreme Court, federal district and circuit courts, the FCC, and the Department of Justice.[16] The claim for

[16] *See, e.g., F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("In most instances underground installation of the necessary cables is impossible or impracticable. Utility company poles provide, under such circumstances, virtually the only practical physical medium for the installation of television cables").

"market" value is really a claim to repudiate the statute which is supposed to limit abuse of that monopoly power.

Contract Issues

GTE asks for the Commission to establish a uniform penalty for unauthorized attachments. We do not believe that the amount suggested (back rent plus 5 more years back rent) reflects industry custom or a fair appraisal of GTE's costs. But this issue should be dealt with, if at all, after the rate formula is adopted.

Application to PUDs

We would support application of the formula to PUDs, as suggested by GTE, using any jurisdiction that the UTC may have (such as certification of telecommunication ventures.)

Access issues

Access to easements and rights of way. Pacificorp asks for clarification concerning rights of access to rights of way and "private" easements. First, the FCC found that

congressional intent underlying the 1996 Act requires a "utility to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments."[17] Second, expanded technological or third party use of a preexisting easement is a widely accepted common-law property right which does not impose costs on the underlying fee owner or the easement holder.[18]

Subsequent Costs. WITA and Puget Sound Energy asks whether a pole owner should have the right to make an attaching party pay for a forced move (transfer), and whether a pole owner may force a competitor off the pole if it desires to make use of that pole. Section 224(i) of federal law codifies a specific finding by Congress that it is unjust and unreasonable for pole owners to charge incumbent cable operators for the makeready caused by deployment of electric or communications lines. Attaching parties bear no responsibility for the modifications to the pole resulting from the addition or modification of facilities made by the utility itself or its licensees. This is part of the general principle that poles must be treated as essential facilities which must be held out on nondiscriminatory terms. As the FCC has held, a utility may not favor itself over other parties with respect to the provision of

[17] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 11181 (1996).

[18] *See, e.g., C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104 (4th Cir. 1994); *Salvaty v. Falcon Cable Television*, 212 Cal. Rptr. 31 (Cal. Ct. App. 1985).

telecommunications or video service in the rates, terms and conditions of attachment.[19] Under that rule, utilities may not exempt their own operations from the ordinary rule that attaching parties must pay for their own makeready. The New York Commission recently adopted this in order to conform with federal law.[20]

Conduit issues

GTE suggests that conduit rents should also be determined in this docket. If that is desired, the conduit formula presently in effect is that set forth in *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*[21] Evidence advanced in the FCC's current docket indicates that a quarter duct methodology is more representative of current use, as noted in Attachment D. In addition, there is no empirical basis for removing one full duct as unusable. (Even the party which suggests this does not suggest that it keeps one vacant duct available for maintenance or emergency use by third parties.)

[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd. 15499, ¶¶ 1156 (1996).

[20] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues,* N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997).

[21] 11 F.C.C.R. 11,202 (Sept. 3, 1996).

Respectfully submitted,

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DETAILED BRIEFING ON REPRODUCTION COSTS

There is no basis whatsoever for upending the formula to base rates on "reproduction" or "replacement" or "forward-looking" costs. The FCC rejected such cost theories when setting the current formula.[22] No certified state calculates pole rate base on a reproduction-cost basis. Instead, reproduction costing has been affirmatively rejected in California,[23] Michigan[24] and New York,[25] after the utilities proffered $30 pole rents based on reproduction costs.

Moreover, any conceivable justification for setting prices on the basis of reproduction costs is entirely absent when dealing with pole attachments.

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[22] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 65-66 (May 23, 1979) ("With regard to the argument advanced . . . that replacement costs should be taken into account in determining pole attachment rates, we do not consider such costs to be reflective of actual costs incurred. We believe historical costs most accurately reflect actual or embedded costs.").

[23] Cal. Pub. Util. Code §767.5 (Deering 1996) ("The basis for computation of annual capital costs shall be historical capital costs less depreciation.").

[24] *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending, Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (Ex. 1 to Initial Comments of NCTA, *et al.*).

[25] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 at 11 (Issued and effective June 17, 1997) (Ex. 2 to Initial Comments of NCTA, *et al.*).

First, there is no market within which such pricing could operate. The premise of utility regulation is to extend the economies of joint use to all customers. To price services on the basis of what a customer would have had to pay in order to produce that service himself is a complete repudiation of the very basis of utility franchises and regulation.[26] The absolute predicate to an efficient, free-functioning economic market of the kind that the utilities speciously claim exists for pole attachments is the existence of multiple suppliers of the goods or services in question. There is no "market" in pole rents because there are not multiple suppliers of poles and there is no viable alternative to using pole space (and there are no viable alternatives for the placement of cable and CLEC facilities). Cable television franchising authorities prohibit the construction of duplicative pole runs and require that cable facilities be attached to existing pole plant.

Second, such pricing will not properly allocate resources. Price "signalling" is not required. Under current pricing regulations, where poles are priced at actual reproduction cost, cable operators do not overconsume pole space. They use only what they need for their particular service requirements, which in most cases is one foot or less of space. In the words of one electric utility official testifying under cross examination at a state-level pole-rate

[26] *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 19-22 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending, Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (Ex. 1 to Initial Comments of NCTA, *et al.*); *see also, Charles F. Phillips, The Regulation of Public Utilities*, 333-35 (1993) (Reproduction cost is an "imaginary cost," replete with substantive accounting flaws and procedural difficulties.).

proceeding, cable operators would not overconsume such space "because it would not be in their best economic interest" to do so.[27]

Even if cable operators *were* to somehow overconsume pole space, utilities would not bear the cost of such overconsumption. Thus, the usual economic thesis for reproduction cost pricing—preventing uneconomic overinvestment by a utility—is completely absent with poles. Utilities are never at risk to overinvest in pole plant because cable operators pay all the upfront modification and pole replacement costs associated with the attachment of their facilities.

Third, the pricing theory underlying replacement cost ignores the essential point that cable operators already are attached to the poles. The utilities have failed to account for the economic costs (externalities) of dismantling installed plant on existing poles, prior to incurring the costs of a more "economic" alternative.

Fourth, current pricing has not distorted utility investment patterns. Utilities have invested in taller and taller poles because—as USTA has testified to the FCC—"the demand for taller poles is derived solely from the increased spatial needs of the electric utilities."

[27] *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 (Feb. 11, 1997) (cross examination of Detroit Edison Co. witness, Karl E. Roehrig, Tr. 839).

Fifth, the utilities themselves use embedded costs for pole attachments and for competitive markets. Embedded costs provide the basis for how they set financial arrangements with telephone utilities under joint-use agreements. They also insist on using embedded costs to secure higher rates and returns on their investment, particularly for stranded investment and for failed (primarily nuclear) construction projects.[28] Given the pro-competitive success fostered by the current formula, pole rates should continue to be calculated on an embedded-cost basis.

[28] Indeed, one recent report explained that all states but one passing electric service de-regulation legislation allow electric utilities to prepare for anticipated competition by recovering substantially all of their (embedded) stranded costs (principally from failed nuclear investments and unprofitable long-term power contracts) from existing ratepayers. Benjamin A. Holden, *Electric-Deregulation Machine Starts To Pick Up Steam*, Wall Street Journal, July 14, 1997, at B.4.

DETAILED BRIEFING ON NEGATIVE NET RATE BASE ISSUES

In 1994, Southwestern Bell Telephone ("SWBT") first brought to the FCC's attention a minor anomaly (which SWBT leveraged into massive rate increases throughout its five-state area) in the pole attachment formula occurring in very unusual circumstances. The anomaly arises if a utility is carrying poles as a negative rate base item, which in turn arises from an extremely aggressive accounting for "negative net salvage." Until relatively recently, standard depreciation practice was to amortize historic investment over the anticipated useful life of the pole, such as 1/40 years or 2.5%. Sometimes an adjustment would be made to account for the anticipated costs of removal, where removal was expected to exceed salvage value. Let us illustrate first with a modest example. If "negative net salvage" was expected to equal 5% of the original cost of the pole, then the current depreciation allowed would be (1+.05)/40, or 2.63%. As utilities found it convenient to maximize cash flow to finance new ventures, their estimates of the costs of compliance with environmental and disposal rules soared. The negative net salvage estimate was no longer 5%, but increased in some cases to, say, $120 for disposing of an original investment of only $100 of plant. The *anticipated costs of removal* was added to the derivation of the depreciation, (1+1.2)/40. In such a case, the current depreciation charge increased to 5.5%, and cash flow increased.

But soon reality caught up. Suppose that the costs of disposal are not so high; or actual retirements are postponed beyond predicted useful lives; or both. In either case, the rate base erodes rapidly until it is negative. Stated another way, the total depreciation taken over the *actual* (as opposed to estimated) useful life of the pole exceeds the original investment. SWBT created this problem and then faulted the FCC formula for failing to cope with it and producing a negative pole rent.

The utility's recovery of cost of removal from its ratepayers through depreciation charges over time has created, in effect, a regulatory asset on which SWBT seeks to earn a return. The FCC has proposed a reasonable solution which results in only minor adjustments to the formula, but which prevents the utilities from recovering the cost-of-removal investment made by others over time.

The FCC proposes that only in those rare circumstances in which the utility confronts this anomaly and has a negative rate base for poles, should the cost of removal (or negative net salvage value) be removed from the poles' depreciation reserve. To compensate for this removal, and to reflect the fact that the utility already has fully recovered the pole assets, the FCC proposes adjustments to the way in which the carrying charges should be calculated. While this does allow the utility, in essence, to avoid reflecting in the pole rate the benefit it has received through depreciation charges for its future costs of removal, on balance,

the FCC's proposal represents a sound mix of accounting consistency and regulatory policy, and is consistent with the "operating margin" method of rate setting which is used when no rate base exists. Regulatory agencies faced with utilities' possessing no rate base traditionally have turned to the operating ratio method to assure a fair return.[29]

First, the FCC proposes to calculate the return element of the carrying charge on the pre-adjustment balance of ratebase. The product of this calculation would be a negative return element, which then would be added to the other carrying charges. We believe that this approach is essential to remove from the rate calculation the return which has been calculated on investment which has already been fully recovered through depreciation and funded in part through zero-cost ratepayer capital. Stated another way, utility ratepayers have compensated the utility for all of its pole investment, making it entirely inequitable to continue to impose a return

[29] *See, e.g., Hamm v. South Carolina Pub. Serv. Comm'n*, 422 S.E.2d 118, 122 (S.C. 1992) (water and sewage utility); *Parks v. Rent Control Bd.*, 526 A.2d 685, 686 (N.J. 1987) (rent control); *Hamm v. South Carolina Pub. Serv. Comm'n*, 344 S.E.2d 600, 602 (S.C. 1986) (motor carrier services); *Public Serv. Comm'n v. Dewitt Water Dist.*, 720 S.W.2d 725, 729 (Ky. 1986) (water utility); *State Ex. Rel. Util. Comm'n v. Public Staff*, 343 S.E.2d 898, 901 (N.C. 1986) (water utility); *Texas Indus. Traffic League v. Railroad Comm'n*, 683 S.W.2d 368, 369 (Tex. 1984) (railroad); *State, etc. v. Intervenor Residents, etc.*, 278 S.E.2d 761, 766-67 (N.C. 1981) (water and sewer utility); *In the Matter of Wilmington Suburban Water Corp. for a General Increase in Rates*, Slip Op. No. 82A-JN-6 (Del. 1982) (water utility); *Moore v. Arkansas Transp. Co.*, 606 S.W.2d 575, 576 (Ark. 1980) (transport company); *Casco Bay Lines v. Public Util. Comm'n*, 390 A.2d 483, 490-91 (Me. 1978) (shipping); *Guida v. Public Util. Comm'n*, 348 A.2d 613, 617 n. 4 (Conn. 1974) (motor transit companies); *Commonwealth v. Federal Maritime Comm'n*, 468 F.2d 872, 874 (D.C. Cir. 1972) (shipping); *D.C. Transit Sys. v. Washington Metro. Area Trans. Comm'n.*, 350 F.2d 753, 759 (D.C. Cir. 1965); *Florida Rate Conference v. Florida R.R. and Pub. Util. Comm'n*, 108 So.2d 601, 603 (Fla. 1959) (common carrier motor freight lines).

element on the ratepayers for the very assets for which they already have paid. Calculating the return component and removing it from the rate calculation makes part of this adjustment.

The FCC also proposes to eliminate the income tax carrying charge, essentially because there would be no income-based tax if there is no return component. We agree that this is the logical corollary to removing the return component. Mechanically, one would need to look only at Account 7240 (on the ARMIS 4202) to permit recovery of taxes other than income taxes.

Therefore, the only carrying charges that still would apply to the fully depreciated poles would be the administrative and maintenance components, and a negative return element.

We do not believe that in these rare occasions that this situation does arise it should be resolved by performing rate base calculations on a gross rather than a net basis. There is a long-recognized and well-founded preference in favor of calculating rate base items on a net basis because it reflects prior recovery of investment through depreciation, and prevents utility overrecovery of actual amounts invested.[30] Moreover, calculating on an "all gross" basis is a misnomer, in that the net rate base must calculated even in an all gross computation. This is because the rate of return is calculated for application to net rate base, and must be grossed

[30] *See, e.g., Telecable of Piedmont, Inc. v. Duke Power Co.*, PA No. 90-0003, DA 95-1362 (June 15, 1995); *Riverside Cable TV, Inc. v. Arkansas Power and Light*, PA No. 85-0001, Mimeo 4813 (May 30, 1985).

down by the ratio of net to gross rate base for application to net.[31] Thus, in order to properly calculate the applicable return element, it is necessary first to calculate that rate on a net basis prior to applying it to gross. No steps are saved in an all-gross calculation. Administrative expediency favors performing the entire calculation on a net basis in the first instance, and there are no regulatory or administrative efficiencies to be gained by moving to all-gross calculations.

The FCC also expresses concern with the logistics of extracting the costs of removal from the depreciation reserve of pole plant. It would be essential to require a utility utilizing this method to provide all of the necessary depreciation records from which the accumulated negative net salvage could be unbundled from historic recovery of original cost. If the information is not produced or sufficiently comprehensive, however, the utility has failed in its burden to provide sufficient information enabling the reliable disaggregation of the accumulated depreciation charges attributable to negative net salvage, and the pole rate should remain at the level it was for the last year that the rate base remained positive.

[31] For example, suppose a utility is authorized an 11.25% return on a gross rate base of $200, and that the rate base is 50% depreciated. In an "all net" calculation, the authorized return percentage would be 11.25% and the return component would be 11.25% * ($200-$100) = $11.25. In an all gross calculation, the authorized return would be 11.25% * [($100/$200)] = 5.625%, and the authorized return component would be 5.625% * $200 = $11.25.

DETAILED BRIEFING ON SAFETY SPACE

The NESC prescribes a so-called "neutral zone" of 30 - 40 inches between a communications conductor and the first horizontal electrical conductor.[32] In 1979, the FCC concluded that the neutral zone is usable space and that no portion of it may be attributed to cable.[33] The claim that the neutral zone is unusable has been rejected, time and again. It was rejected first in Docket 78-144; then in the *Monongahela Power* case;[34] then again before the FCC on rulemaking;[35] in subsequent litigated cases;[36] in state pole attachment proceedings[37] and in Congress' repeated reexamination of pole attachment and cable television regulation in

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[32] Under current NESC specifications, the neutral zone may be only 30 inches, instead of 40 inches, where the top communications facility and the electric facilities are bonded to a common ground. *See* NESC Rules 235C1 (Exception 3), 235C2b(1)(a), and 235C2b(3).

[33] *Rules for the Regulation of Cable Television Pole Attachment*, Mem. Op. and Second Report and Order, 72 F.C.C.2d 59, 70 (1979).

[34] *Monongahela Power Co., et al. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

[35] *Petition to Adopt Rules Concerning Usable Space On Utility Poles*, 56 R.R2d 707, 710 (1984).

[36] *General Television of Delaware, Inc. v. Diamond State Telephone and Telegraph Co.*, PA-84-0015, Mimeo No. 2141 (Jan. 28, 1985); *El Paso Cablevision, Inc. v. Mountain States Telephone & Telegraph Co.*, 49 R.R.2d 847 (1981).

[37] *See, e.g., In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997); *Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 27 (Feb. 11, 1997), *reh'g denied* (April 24, 1997); *Ohio Edison Co., et al.*, No. 81-1171-EL-AIR (Ohio Pub. Serv. Comm'n Nov. 3, 1982); Cal. Pub. Util. Code § 767.5 (1996).

1983,[38] 1984,[39] 1992,[40] and 1996,[41] when the utilities failed on four separate occasions to move Congress to repeal this formula. It was rejected again in 1997 in Michigan and New York.[42]

There are sound operational and economic reasons for assigning the neutral zone directly to the electric utilities in this fashion.

First, the neutral zone does not exist for the benefit of communications attachments. It does not even exist on poles used solely for cable or for cable and telephone. It exists only for electrical attachments which must maintain a prescribed distance from all conductors of differing voltages. Just as the space separating electrical conductors from one another is "usable" space actually used by power, the neutral zone separating it from communications conductors is usable and used by electric.

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[38] Communications Amendment Act of 1982, Pub. L. No. 97-259 (1983).

[39] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[40] Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[41] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[42] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n. Case No. 95-C-0341 (Issued and effective June 17, 1997). (Ex. 2).

Second, the neutral zone is space required by electric companies to maintain their own minimum clearances *above grade*. While cable and communications lines may meet their above-ground height requirements with relatively short poles (30-35'), power companies must cross roads at greater heights, particularly when racking conductors of higher voltages. That extra height is achieved in part by the "neutral" zone.

Third, the neutral zone is not "dead space" unusable for any other purpose. The neutral zone can be, and is, used for street light attachments, from which electric utilities derive additional revenues.

These are among the reasons that the FCC formula specifically assigns the neutral zone as usable space used by electric utilities.[43]

The treatment has been reconfirmed by the commercial agreements in which diversifying electric utilities are now entering. For example, in a September 1997 submission before the Securities and Exchange Commission , Boston Edison specified that the neutral zone

[43]*Rules for the Regulation of Cable Television Pole Attachment,* Mem. Op. and Second Report and Order, 72 F.C.C.2d 59, 70 (1979)

is part of the power space in which it was joint venturing to build fiber optic communications networks with RCN.[44]

[44] See Construction and Indefensible Right of Use Agreement Between BecoCom, Inc. and RCN-BecoCom L.L.C. (dated June 17, 1997) at 3 (filed with RCN Corp's Amendment No. 2 (Exhibit 10.10) to SEC Form 10A filed with the SEC Sept. 5, 1997).

DETAILED BRIEFING ON CONDUIT HALF DUCT CONVENTION

The half-duct convention, while correctly reflecting the fact that new cable and telecommunications construction rarely occupies and entire duct, does not go far enough in replicating actual engineering, provisioning and underground construction practices for deployment of ducts and conduits. Such practices routinely include the extensive use of a wide variety of inner-duct technologies that subdivide ducts into many separate conductor compartments.

Leading manufacturers of inner-duct devices advertise that their products subdivide primary four-inch duct as small as two inches in diameter into as a many as 6 inner ducts. Indeed as long ago as 1981, the Bell System provided for the placement of four-compartment innerduct in 3-1/2 square and 4 inch ducts.[45]

Given that fiber optic and coaxial cables occupy only a minuscule portion of available duct capacity, and the virtually universal use of multi-party inner duct in duct systems throughout the nation, we agree with the FCC that it should formally adopt the methodology set forth in the *Multimedia* case, but rather than the half-duct convention enunciated there, the FCC should adopt a quarter-duct convention.

[45] Bell system outside plant construction placing methods, Section 628-200-215 Issue 1 § 1.03 (Feb. 1981)

Under this approach, the conduit rate formula would be adjusted so that cable operators and CLECs would be presumed to occupy only ¼ of one duct, and it would be incumbent upon the conduit owner to prove that the attaching party occupied a greater portion of a duct, or the attaching party to show that it occupied less. Given advances in innerduct technologies, and the use of thinner, higher capacity fiber-optic cables, we believe that the quarter-duct convention is quite conservative.

There should be no presumption that maintenance or emergency duct is available for use by cable operators and others, or that conduit owners should treat one duct as set aside one duct exclusively for such use. Our experience has been that neither of these presumptions is reflective of field practice, and that cable operators are not permitted to use the maintenance duct even in cases of emergency.

In the event that the Commission does not determine that there should not be an exclusion of these ducts from the maintenance component of the carrying charge factor denominator, at a minimum, it should place the burden on the utilities to prove their availability for use by cable operators and other attaching parties; and should remove only the ductage associated with the duct convention adopted (e.g., one-quarter duct).