EXHIBIT PDK 11

POLE ATTACHMENTS

by

Ad Hoc Group of the
706 Federal/State Joint Conference
on Advanced Services

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EXECUTIVE SUMMARY

Pole attachment rates in this country are generally established by the Federal Communications Commission (FCC). These rates are approximately $6 per pole attachment per year. [1] Due to recent court decisions, there is the potential that the FCC will be displaced as the arbiter of pole attachment rates for both Internet and wireless connections. Should the Supreme Court of the United States decide that the FCC has over-stepped its authority, there is the potential that pole attachment rates could increase significantly. We believe this could have a detrimental effect on the deployment of advanced services to all Americans. If the FCC loses its jurisdiction over this rate setting activity, we believe the States should assert jurisdiction over pole attachments and maintain the currently established rate structure. We further believe that current rates are both fair and reasonable and that they promote facilities based competition. This paper contains a draft recommendation that model legislation from California may be considered by other States that may assume jurisdiction over the rate making process for pole attachments.

[1] See pg. 8 for rate survey results.

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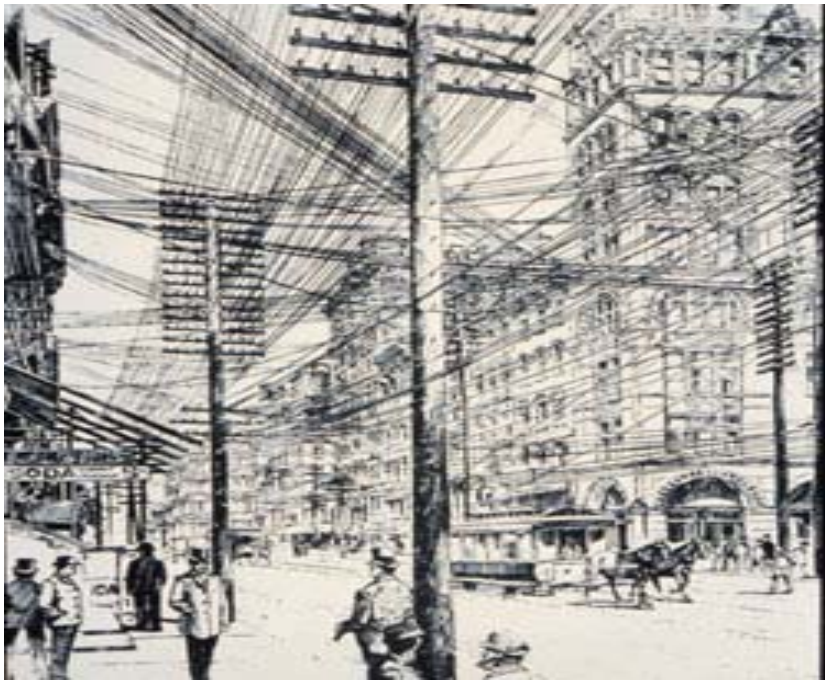
ACKNOWLEDGMENTS

The Ad Hoc Committee would like to acknowledge those that were instrumental in the creation of this compilation and review on pole attachments: Paul Glist, nationally known expert on pole attachments contributed mightily to this project, Jovon Snipes, Laura Gilleland-Beck, and the staff at the Florida State University Law Library. All are to be commended for their contribution to this project, but more importantly, for their patience when dealing with an onslaught of repeated questions and misinterpretations.

DISCLAIMER

In response to a resolution by the National Association of Regulatory Utility Commissioners (NARUC) Board of Directors, and sponsored by the Committee on Telecommunications, the following status paper and survey on pole attachments has been prepared. The Ad Hoc Committee would like it to be known that the opinions contained within this report are their own and that they do not represent the beliefs of any individual Commission or NARUC generally.



INTRODUCTION

Testifying before the U.S. Senate on pole attachments, John E. Logan, Acting Chief of the FCC's Cable Services Bureau in 1998, stated:

> Congress enacted Section 224 of the Communications Act to ensure that utilities' control over their infrastructure (poles, ducts, conduits and rights-of-way) would not create a bottleneck that stifled the growth of cable television. The 1996 Act expanded the scope of Section 224 to support access by telecommunications providers as well. Access to utility infrastructure at just and reasonable rates is critical to the development of competition in the

telecommunications and video markets. Without reasonable access, electric, phone and other utility infrastructure owners could effectively prohibit the entry of new providers to the market and stifle current providers in the delivery of new services. Section 224, and the Commission's implementation of the statutory provision, are therefore fundamental to the emergence of a competitive environment as they ensure access, particularly by new entrants. Section 224 also provides for increased compensation for utilities, so that they are appropriately compensated for this expanded use of their facilities. The Bureau is responsible for pole attachment rulemaking and enforcement and adjudicates complaints relating to access, rates, terms, and conditions of pole attachment agreements. This work benefits wireless and wireline telecommunications providers, pursuant to Section 703 of the 1996 Act, as well as data services companies and providers of video.

In agreement with these comments regarding infrastructure bottlenecks, the National Association of Regulatory Utility Commissioners passed the following resolution:

> **WHEREAS**, Section 224 of the Communications Act of 1934, as amended (47 U.S.C. Section 224 "the Pole Attachment Act"), requires utilities to provide telecommunications carriers with non-discriminatory access to poles, ducts, conduits, and rights-of-way; and
>
> **WHEREAS**, Prompt, nondiscriminatory access to poles, ducts, conduits and rights-of-way at reasonable rates, terms, and conditions is essential to the development of facilities-based competition, the deployment of state-of-the-art telecommunications services to the public and the implementation of facilities- based / broadband network redundancy to safeguard against network outages; and

WHEREAS, Carriers seeking to offer new facilities - based / broadband and other telecommunications services have reported an inability to obtain prompt, non-discriminatory access at reasonable rates and on reasonable terms and conditions from some utilities; and

WHEREAS, The failure of a utility to provide prompt, non-discriminatory access might be an insurmountable barrier to entry to new carriers offering innovative facilities-based / broadband and other services; and

WHEREAS, Pursuant to the Pole Attachment Act, the Federal Communications Commission (FCC) has jurisdiction to ensure that the rates, terms, and conditions governing access to poles, ducts, conduits and rights-of-way are just and reasonable and to hear complaints regarding the same, unless a state chooses to regulate such rates, terms, and conditions; and

WHEREAS, State Commissions have been at the forefront of implementing and enforcing open market requirements to ensure that all consumers have access to broadband communications services; and

WHEREAS, State Commissions have regulatory authority over utilities and the expertise to address the inability to receive non-discriminatory access to their poles, ducts, conduits and rights of way; now therefore be it

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), assembled in its November 2000 112th Annual Convention in San Diego, California, supports and recommends State Commissions consider asserting jurisdiction over the rates, terms and conditions governing access to poles, ducts, conduits, and rights-of-way; and be it further

RESOLVED, That NARUC establish an ad hoc committee to investigate the policies, practices and procedures of utilities, including those owned by a cooperative or by a state, county, municipality or other governmental or quasi-governmental body, regarding the provision of access to their poles, ducts, conduits, and rights-of-way and to submit its recommendations at the NARUC Winter Meeting 2001 regarding rules, regulations, policies and

incentives that State Commissions should adopt to further the goal of prompt, non-discriminatory access at reasonable rates; and be it further

RESOLVED, That NARUC urges State Commissions, to the maximum extent possible, to take all actions necessary to ensure that prompt, non-discriminatory access is provided to requesting carriers at reasonable rates and terms to guarantee access to facilities - based / broadband communications to all consumers.

The following report is an attempt to investigate the policies, practices, and procedures regarding the provision of access to poles, ducts, conduits and rights-of-way. To facilitate the determination of rules and regulations that State Commissions may consider to insure the goal of prompt, non-discriminatory access, the staff of the Ad Hoc Committee compiled the following:

1) State statutes currently in effect regarding access to poles, ducts, conduits and rights-of-way (referred to as “pole attachments” for the remainder of report).

2) State rules regarding access to pole attachments.

3) Survey of state rates for attachment.

4) Recent time line of FCC development of attachment rules and settlement of disputes.

5) Model State Legislation

At a time when legal uncertainly regarding attachment rates is becoming

pronounced, it is critically important that all States be prepared to step in to insure that fair rates are established and that the goals of the 1996 Telecommunication Act are fulfilled. Former FCC Commissioner Kennard stated:[2]

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is -- the network of our national community. We must always be looking for ways to remove barriers to investment and to promote competition. I am particularly concerned about deployment in rural areas and in inner cities. Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. But today's Report suggests that in the very short term, demand for high bandwidth will really start to take off. My concern is that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.

The Pole Attachment Act of 1978 and subsequent related FCC regulations were enacted in an attempt to open the bottleneck control of poles and conduit. Bottleneck control was being misused to constrain facilities-based competition. Today, the FCC has created a pricing mechanism that forestalls the need for protracted and expensive litigation among utility companies. As the enclosed survey indicates, a vast majority of the States determine pole attachment rates via this formula.

[2] Separate Statement of Chairman Kennard, accompanying the Commission's Report on the Deployment of Advanced Telecommunications Capability to All Americans, CC Docket No. 98-146, released February 3, 1999.

POLE REGULATION

Currently, 42 States follow the FCC's rules in handling pole attachments. Eight States and the District of Columbia have their own rules (see Attachment A). While States are permitted to "certify" their jurisdiction and regulate pole attachments directly, only 18, and
the District of Columbia, have done so. They are:

Alaska	Massachusetts
California	Michigan
Connecticut	New Jersey
Delaware	New York

District of Columbia	Ohio
Idaho	Oregon
Illinois	Utah
Kentucky	Vermont
Louisiana	Washington
Maine	

FCC/STATE POLE ATTACHMENT RATES

Under FCC rules, to determine attachment rates, one must determine three things: 1) cost of the bare pole,[3] 2) cost of carrying charges,[4] and 3) the "use ratio."[5] As of February 8, 2001, the rules have been altered to consider not only usable space, but to also allocate a portion of the cost related to unusable space (for telecommunication attachments). This rule change is being factored in over a five year period. Based upon the assumption that 3 parties attach to a pole, it is estimated that this change will result in rates going from $5 to $6 today to the mid-teens by 2006. The following charts (see the next five pages) detail the findings of a biennial census of attachment rents across the nation:[6]

[3] Gross investment in pole plant, less the depreciation reserve for poles, less accumulated deferred taxes. Deduction is made for "pole appurtenances" that are of no value to the attacher, such as the cross-arms used for power lines.

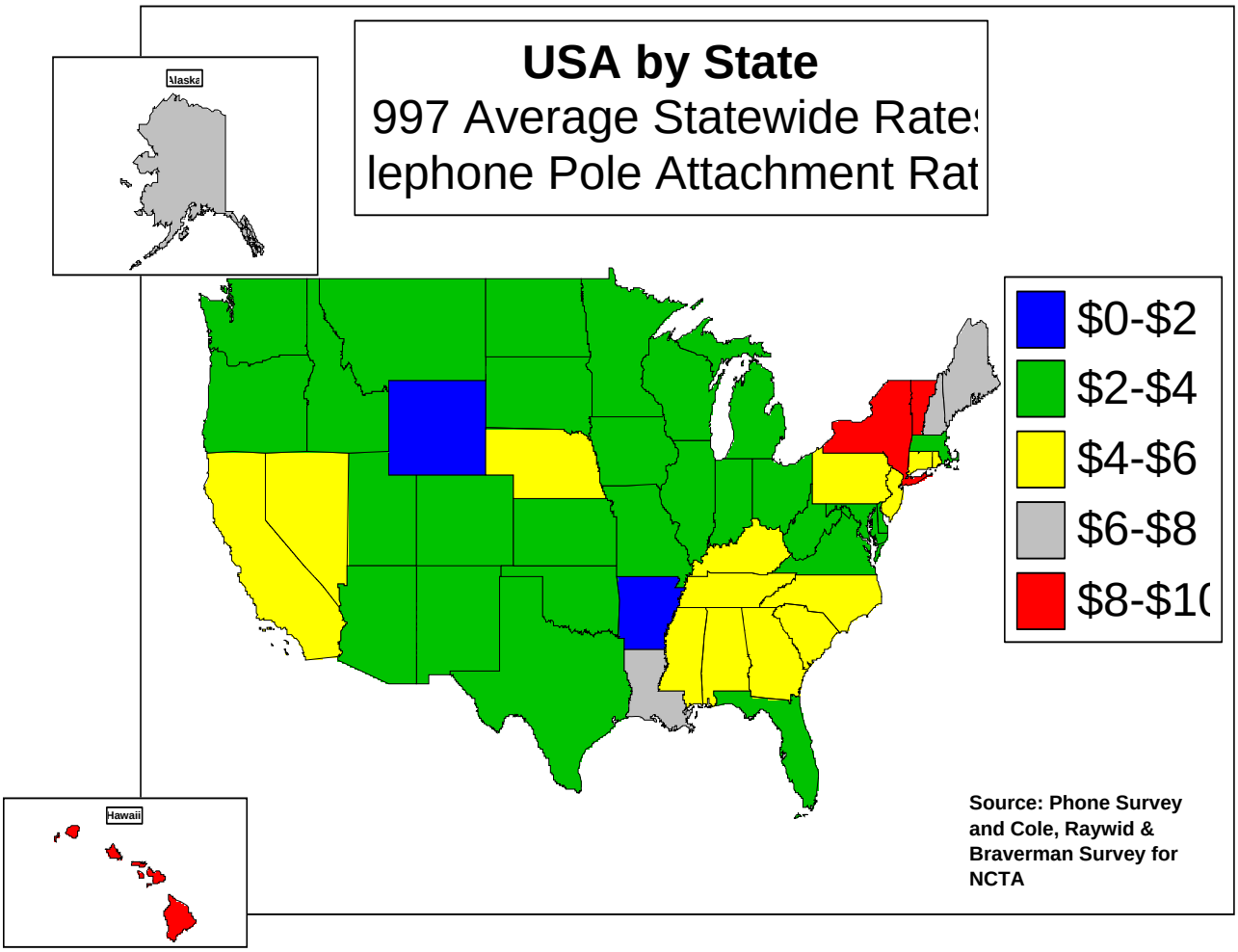
[4] Carrying charges include maintenance expense, depreciation expense, administrative expense, taxes, and a factor for state determined rate-of-return.

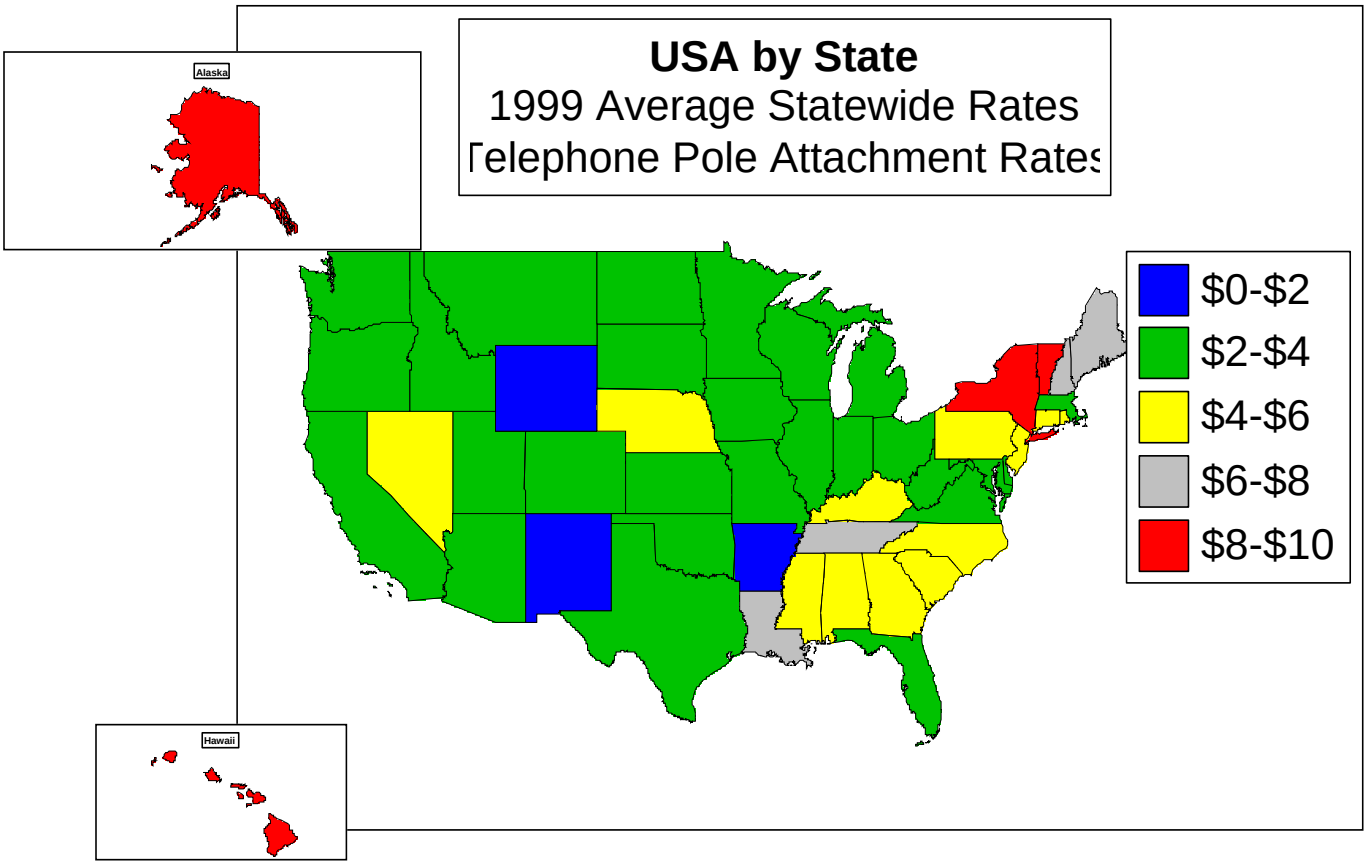
[5] The use ration is the portion of space occupied by an attachee. Presumptive calculations can be altered though the submittal of proper surveys and or inventory reports.

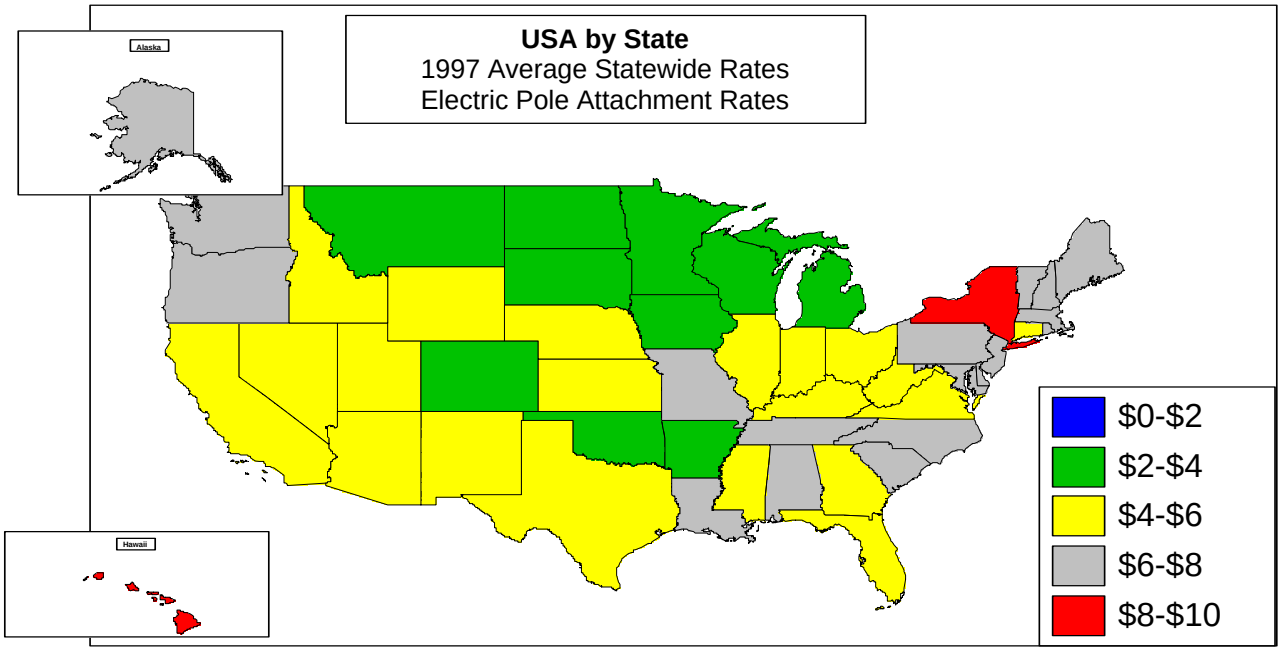
[6] Paul Glist, Cole, Raywid, and Braverman, 1919 Pennsylvania Ave., N.W., Suite 200, Washington, D.C. 20006-3458, www.crblaw.com.

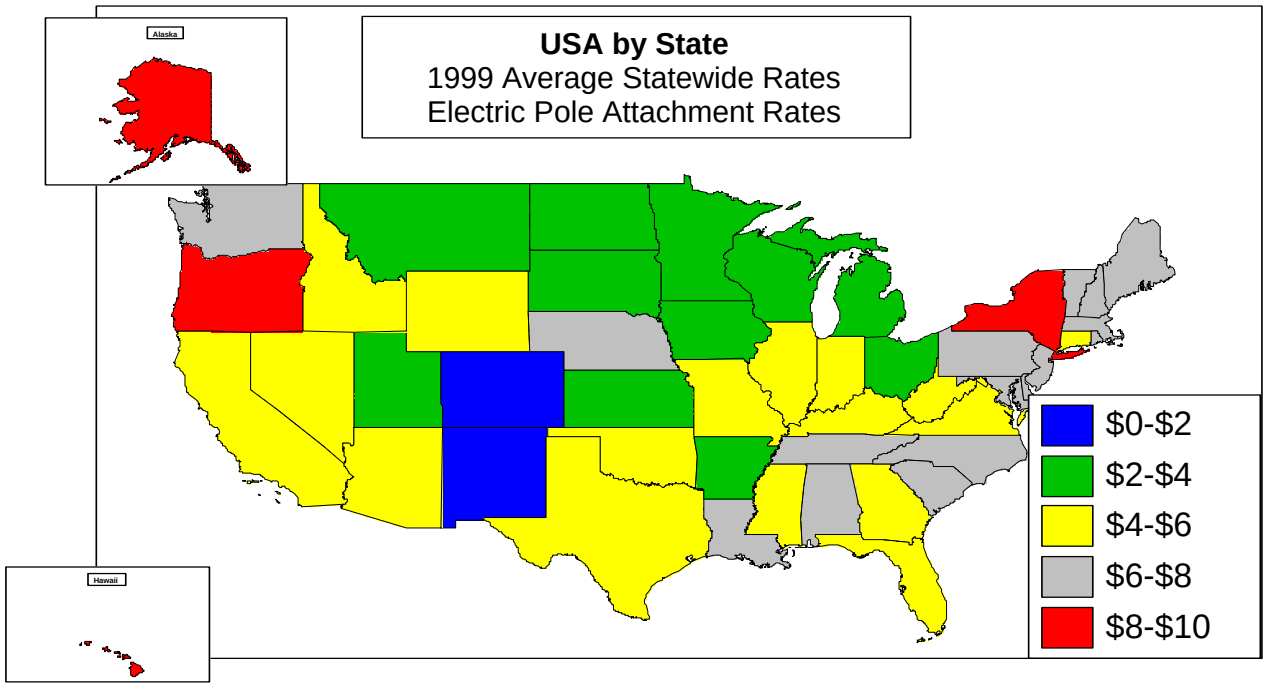
1997/1999 POLE RATE SURVEY ANALYSIS

	Telephone			Electric		
State	1997 State Average	1999 State Average	% Change	1997 State Average	1999 State Average	% Change
Alabama	$4.01	$5.17	28.93%	$7.02	$7.02	0.00%
Alaska	$7.00	$10.00	42.86%	$7.00	$9.01	28.71%
Arizona	$3.50	$3.35	-4.29%	$5.20	$4.61	-11.35%
Arkansas	$1.99	$1.99	0.00%	$4.00	$4.00	0.00%
California	$5.18	$3.40	-34.36%	$5.61	$5.26	-6.24%
Colorado	$4.00	$4.00	0.00%	$3.44	$1.72	-50.00%
Connecticut	$5.83	$5.83	0.00%	$5.83	$5.83	0.00%
Delaware	$2.68	$2.68	0.00%	$7.30	$7.30	0.00%
District of Columbia	$2.57	$2.57	0.00%	$5.00	$5.00	0.00%
Florida	$3.54	$3.99	12.71%	$4.90	$5.36	9.39%
Georgia	$4.56	$4.56	0.00%	$5.79	$5.79	0.00%
Hawaii	$7.20	$8.50	18.06%	$8.50	$8.50	0.00%
Idaho	$2.76	$2.76	0.00%	$4.33	$5.00	15.47%
Illinois	$3.46	$3.73	7.80%	$4.16	$4.20	0.96%
Indiana	$3.75	$3.75	0.00%	$5.70	$5.57	-2.28%
Iowa	$2.75	$2.75	0.00%	$3.50	$3.50	0.00%
Kansas	$3.60	$3.21	-10.83%	$4.01	$4.00	-0.25%
Kentucky	$4.64	$5.16	11.21%	$4.97	$4.97	0.00%
Louisiana	$6.90	$6.90	0.00%	$6.16	$6.56	6.49%
Maine	$7.13	$7.13	0.00%	$7.20	$7.50	4.17%
Maryland	$2.21	$2.21	0.00%	$6.40	$6.40	0.00%
Massachusetts	$3.59	$3.59	0.00%	$6.66	$6.80	2.10%
Michigan	$3.47	$3.47	0.00%	$3.74	$3.74	0.00%
Minnesota	$3.13	$3.13	0.00%	$3.48	$3.48	0.00%
Mississippi	$4.94	$4.71	-4.66%	$5.20	$5.77	10.96%
Missouri	$3.94	$3.39	-13.96%	$6.44	$4.72	-26.71%
Montana	$2.50	$2.50	0.00%	$3.38	$3.55	5.03%
Nebraska	$4.58	$4.50	-1.75%	$5.77	$6.12	6.07%
Nevada	$4.38	$4.38	0.00%	$5.22	$5.22	0.00%
New Hampshire	$7.26	$7.26	0.00%	$7.61	$7.61	0.00%
New Jersey	$4.91	$4.91	0.00%	$6.73	$6.73	0.00%
New Mexico	$2.95	$1.07	-63.73%	$5.30	$1.00	-81.13%
New York	$9.43	$9.43	0.00%	$9.88	$9.88	0.00%
North Carolina	$4.45	$4.45	0.00%	$6.22	$6.22	0.00%
North Dakota	$2.75	$2.75	0.00%	$3.50	$3.50	0.00%
Ohio	$2.70	$2.72	0.74%	$4.09	$4.00	-2.20%
Oklahoma	$2.91	$2.14	-26.46%	$3.78	$4.24	12.17%
Oregon	$3.71	$3.96	6.74%	$7.12	$8.12	14.04%
Pennsylvania	$4.60	$4.60	0.00%	$6.80	$6.80	0.00%
Rhode Island	$4.98	$4.98	0.00%	$6.71	$6.71	0.00%
South Carolina	$4.41	$4.41	0.00%	$7.23	$7.23	0.00%
South Dakota	$2.75	$2.75	0.00%	$2.33	$3.50	50.21%
Tennessee	$4.57	$6.18	35.23%	$7.30	$7.30	0.00%
Texas	$3.00	$2.58	-14.00%	$4.05	$4.06	0.25%
Utah	$4.00	$3.00	-25.00%	$4.65	$2.33	-49.89%
Vermont	$9.06	$9.06	0.00%	$6.01	$6.01	0.00%
Virginia	$2.40	$2.40	0.00%	$4.39	$4.39	0.00%
Washington	$3.35	$3.10	-7.46%	$7.34	$7.76	5.72%
West Virginia	$3.73	$3.73	0.00%	$5.84	$5.84	0.00%
Wisconsin	$2.91	$2.90	-0.34%	$3.24	$3.98	22.84%
Wyoming	$1.85	$2.00	8.11%	$4.21	$4.21	0.00%
TOTALS						
Average Rates	$4.17	$4.19	0.57%	$5.49	$5.45	-0.83%
Maximum Rates	$9.43	$10.00		$9.88	$9.88	
State	New York	Alaska		New York	New York	
Minimum Rates	$1.85	$1.07		$2.33	$1.00	
State	Wyoming	New Mexico		South Dakota	New Mexico	
States Self Regulate						
Average Rates	$6.13	$6.00	-2.10%	$7.39	$7.85	6.18%
FCC Regulated						
Average Rates	$3.00	$3.12	3.82%	$4.37	$4.02	-7.87%



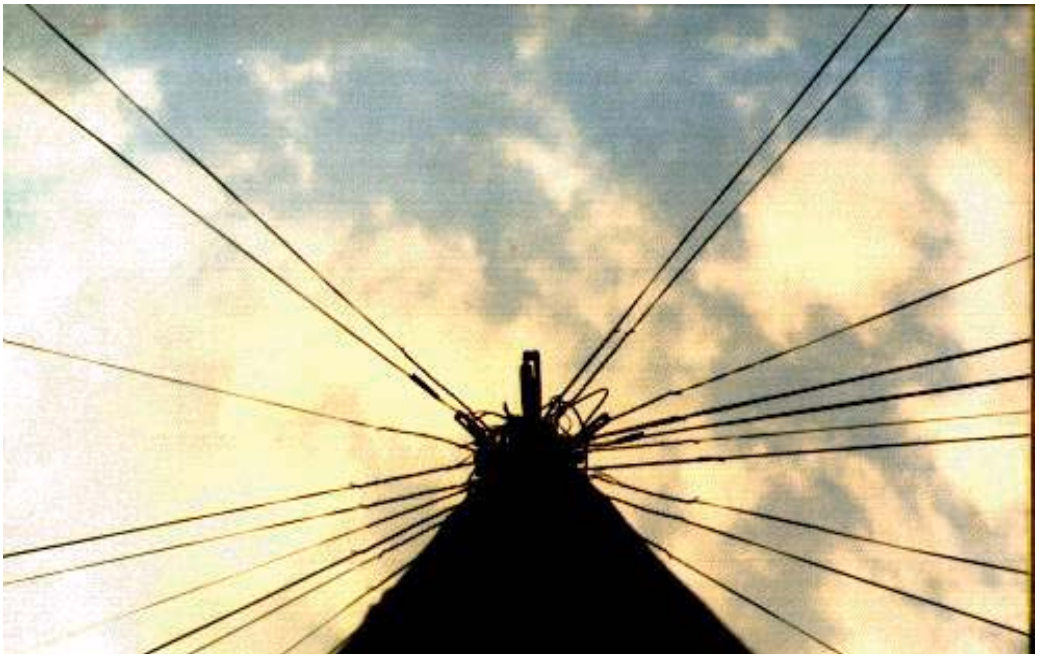






Based on an informal survey of State rates as of the end of 2000, there is not an appreciable difference between the rates charged in 1999 and those currently in effect.

The national average for pole attachment rates is $4.19 for telephone and $5.45 for electric. The average for States that self-regulate is $6.00 for telephone and $7.85 for electric. The highest state average is Alaska at $10.00. The lowest in the country is New Mexico, at just over $1.00.



SECTION 224 RULES

Section 224 of the 1996 Telecommunication Act mandates nondiscriminatory access to the poles, ducts, conduits, and rights-of-way of telephone and electric utility companies at just and reasonable rates. The Act requires that pole owners can only deny access for reasons

of safety, reliability, and generally applicable engineering purposes.[7] Charges for attachment must be just, reasonable, and nondiscriminatory.[8] Pole attachment charges for telecommunication providers shall include both costs for usable and unusable space.[9] A utility must impute and charge its affiliates the pole attachment rates it charges others.[10]

At the FCC, an electric or telephone utility can only charge for the cost related to the portion of usable space that is occupied on the pole. However, as of February 8, 2001, telecommunications providers who wish to attach will also be assessed a portion of utility costs associated with the unusable space on the pole. This "telecommunications surcharge" does not apply to cable attachments. The new rate formula will be phased in over five years, but will take seven years before the provisions are fully effective.[11]

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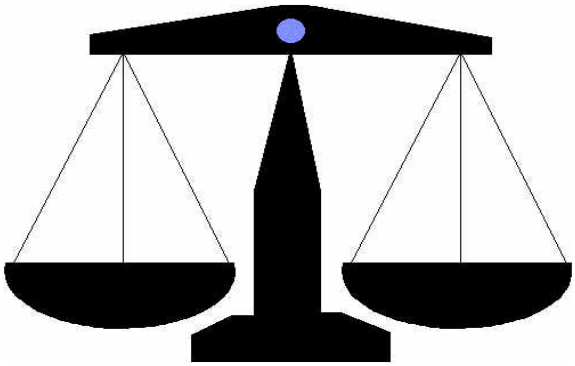
[7] Section 224(f) and 251(b)(4).

[8] Section 224(a)(5), (e)(1).

[9] Section 224(d)(1) - (3), (e)(I).

[10] Section 224(g)

[11] Electric Utilities and the Telecommunications Act of 1996, Alfred M. Momlet, pg. 5.



COURT ACTION

In the 1960's, the telephone companies made aggressive moves against the cable industry through pole attachment rates and conditions. This had a detrimental effect on the deployment of cable services. Cable industry and consumer groups alike led an effort to get the FCC to assert authority over the regulation of pole attachments in an attempt to promote the deployment of cable service. This successful effort, along with the 1978 Pole Attachment Act, resulted in increased levels of deployment and investment in cable facilities. By eliminating monopolistic control over access and the imposition of unreasonable rates and charges, the cable industry was able to blossom.

Today we are threatened with history repeating itself. The players are different, now we have CLEC providers and power utilities, but the scenario is the same. While the ILEC industry generally accepted Congressional action on and FCC regulation of pole

attachments, the electric utilities have steadfastly fought these measures. Electric companies have repeatedly claimed that rates set by the FCC or individual States are insufficient and constitute a taking of private property under the takings clause.[12]

In a decision issued April 11, 2000, the United States Court of Appeals for the Eleventh Circuit addressed various aspects of the FCC's 1998 Pole Attachment Order implementing Section 224 of the Communications Act.[13] The court concluded that the FCC had no jurisdiction over pole attachments for wireless and Internet services.

Prior to the 1996 Act, Section 224 established principles governing the rates that could be charged by pole owners to cable operators who attached their facilities to utility poles, ducts, conduit and rights-of-way. The 1996 amendments to Section 224 added a mandatory access requirement to the statute, and also extended the statute to cover pole attachments by telecommunications carriers. The Eleventh Circuit affirmed a district court decision that Section 224(f) constitutes a taking of utility property, but that it is not unconstitutional because the statute provides for compensation to be set by the FCC, and for judicial review as a matter of right.

In Gulf Power II, the court addressed challenges to the FCC's implementation of Section 224, as distinct from the facial challenges to the statute itself in Gulf Power I. The court agreed with the electrical utilities that the FCC had exceeded its authority under

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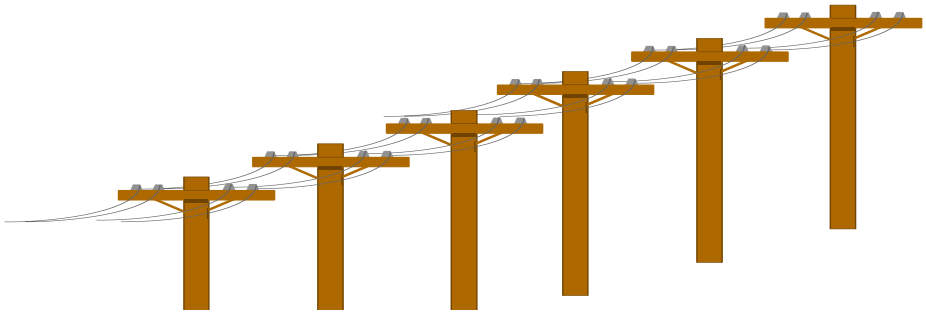
[12] Fifth Amendment of U.S. Constitution.

[13] See Attachment K.

Section 224 by claiming that wireless carriers have a right of access to utility poles under Section 224(f). Reading the access requirement of Section 224(f) in combination with the definition of utility in Section 224(a)(1), the court ruled that Congress clearly intended to give the FCC authority only over attachments for wire communications, and by negative implication, does not give the FCC authority over attachments to poles for wireless communications.

The court also agreed with the pole owners that the FCC has no jurisdiction with respect to attachments for Internet service. The court reasoned that Section 224 provides the Commission with authority to regulate rates for attachments "solely to provide cable service" and attachments to provide "telecommunications services." Because the FCC has defined Internet services as information services, and not cable nor telecommunications services, the court ruled that the FCC did not have jurisdiction over these attachments. The case is now before the Supreme Court and a decision regarding FCC jurisdiction is expected early next year.



RECOMMENDATION

First, the Ad Hoc group would recommend that immediate action is unnecessary and that we should await the Supreme Court's decision in the Gulf Power II case. Should the court affirm the FCC's role in rate setting over advanced services and wireless

attachments, then the nation can continue to rely on the regulations which have been developed to date.

Secondly, should the Supreme Court decide that the FCC has no rate setting jurisdiction over advanced services and wireless attachments, then the individual States should seriously consider passing legislation/rules that will allow State utility commissions to determine fair and reasonable rates for intrastate access to poles, ducts, and rights-of-way.

Thirdly, should more States assert jurisdiction over pole attachments rates, we believe it would be expedient to use the case proven rules of the FCC as a guideline. The FCC has resolved approximately 300 cases in 20 years of pole attachment regulation[14] and this body of casework should not be abandoned.

To frame the decision making process for rate setting, the following underlying principles should be considered:

< presumption of “attach ability”

< preclusion of subsidiary favoritism

< prohibition against “reserving” space

[14] Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments, CS Docket No. 97-151 at pg. 8, n. 97.

- reasonable time certain deadlines for handling applications and conducting make-ready preparations

- permit "overlashing"

- provide remedial tools to Commissions to deter discrimination and unreasonable denial of access

- cooperative federalism between the FCC and the States

We also recommend that a single formula be determined and that the "telecommunications surcharge" currently in the FCC rules be eliminated.[15] For this reason, we are recommending that States use the California statute as a model for determining pole attachment rates; a model that sets one rate for both cable and telecommunications. The following details the California rule and further information can be found in Attachment J:

> SECTION 767. Whenever the commission, after a hearing had upon its own motion or upon complaint of a public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to

[15] See Attachment L

the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation therefor, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use. If such use is directed, the public utility to whom the use is permitted shall be liable to the owner or other users for such damage as may result therefrom to the property of the owner or other users thereof, and the commission may ascertain and direct the payment, prior to such use, of fair and just compensation for damage suffered, if any.

SECTION 767.5. (a) As used in this section: (1) "Public utility" includes any person, firm, or corporation, except a publicly owned public utility, which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communication. (2) "Support structure" includes, but is not limited to, a utility pole, anchor, duct, conduit, manhole, or handhold. (3) "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility. (4) "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the commission, to allow its use by a cable television corporation for a pole attachment. (5) "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the commission, for a pole attachment. (6) "Usable space" means the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance. (7) "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along rights-of-way or other areas as specified in the orders and regulations of the commission. (8) "Rearrangements" means work performed, at the request of a cable television corporation, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of a cable

television corporation, of the support structure in order to provide adequate surplus space or excess capacity. (9) "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis for computation of annual capital costs shall be historical capital costs less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this paragraph, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

(b) The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations. The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

(c) Whenever a public utility and a cable television corporation or association of cable television corporations are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the commission shall establish and enforce the rates, terms, and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following: (1) A one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the cable television corporation. (2) An annual recurring fee computed as follows: (A) For each pole and supporting anchor actually used by the cable television corporation, for a period of four years following the effective date of this section, the annual fee shall be two dollars and fifty cents ($2.50). Thereafter, the annual fee shall be two dollars and fifty cents ($2.50) or 7.4 percent of the

public utility' s annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents ($2.50) under this section, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor. (B) For support structures used by the cable television corporation, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the cable television corporation's equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the cable television corporation's equipment.

(d) In the event that it becomes necessary for the public utility to use space or capacity on or in a support structure occupied by the cable television corporation's equipment, the cable television corporation shall either (1) pay all costs for rearrangements necessary to maintain the pole attachment or (2) remove its cable television equipment at its own expense.

SECTION 767.7.(a) The Legislature finds and declares all of the following: (1) The Legislature has encouraged, and continues to encourage, the rapid and economic development of telecommunications services to all Californians. (2) Pursuant to Section 767.5, public utilities have dedicated a portion of their support structures to cable television corporations which have been increasingly attaching fiber optic cable that is capable of a variety of telecommunications uses. Other utilities not under the jurisdiction of the commission have also made the same dedication. (3) Public utility and publicly owned utility support structures are also used by entities, other than cable television corporations, with the acquiescence of the public utility and voluntary permission of the publicly owned utility, for the purpose of installing fiber optic cable in order to provide various telecommunications services. (4) Electric public utilities are currently installing fiber optic cables on their systems to enhance their operations and better serve their customers. Fiber optic cables installed by telephone, cable, and other telecommunications corporations may be accessed by electric public utilities and publicly owned utilities to enhance their operations and better serve their customers. The

> access may be accomplished by contract or through the purchase of tariffed services.
>
> (b) It is therefore the intent of the Legislature that public utilities and publicly owned utilities be fairly and adequately compensated for the use of their rights-of-way and easements for the installation of fiber optic cable, and that electric public utilities and publicly owned utilities have the ability, if they so desire, to negotiate a purchase, lease, or rent of access to those fiber optic cables for their own use.
>
> (c) Nothing in this section shall be deemed to change existing law with respect to Section 767.5.

The simplicity of the California method is that there is only one pole attachment formula and this calculation can be easily made from readily available information.[16] Since the opening of the local exchange market to competition, various cable operators now offer telecommunication services over the same connections used for cable television service. There is generally no difference in the physical connection to the poles or conduits attributable to the particular service involved. In many cases, a cable operator may not be able to delineate exactly what particular services are being provided to a customer at a given time, since the customer can use the connection for various services, depending on the equipment attached at the customer's premises. In such instances, it would be difficult and impractical to police how a given pole attachment is used to provide separate services offered over the same pole connection, or to delineate what portion of the usage was attributable to telecommunications versus other services offered by the cable company. Accordingly, to avoid the problems involved in separately measuring different

[16] Each cost element is recorded in the ARMIS accounts (telephone) and FERC Form 1 Accounts (power). Pole ownership numbers can be obtained from continuing property records. Deprecation and rate-of-return rates can be obtained from individual state commissions.

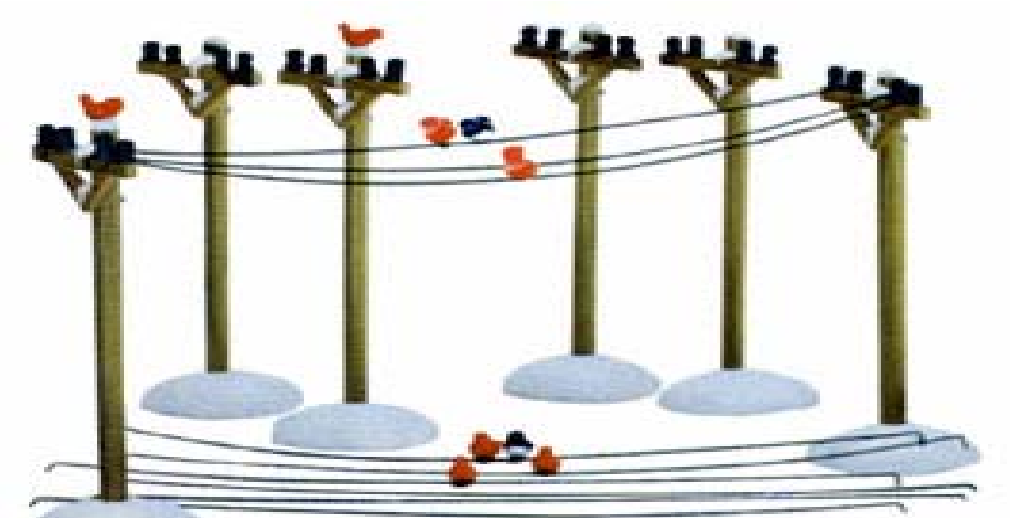
types of data transmission services over the same connection, we conclude that the formula prescribed by California rule for cable television pole attachments could apply uniformly to cable, Internet and telecommunications services. By applying a consistent formula for all attachments, one would hope to avoid protracted disputes over how particular attachments are being used or how separate rates will be prorated among different volumes of transmissions over the same connection. California appears committed to ensuring that all telecommunications carriers gain access to utility attachments under nondiscriminatory rates, terms, and conditions. They have concluded that all CLECs should be entitled to comparable pole attachment rates as are available to those CLECs affiliated with or owned by a cable, phone or electric company. They believe the use of the existing cable pole attachment rate for all CLECs will also avoid the need for further protracted proceedings requiring expensive cost studies. California has directed that the same pole attachment rate provisions applicable to cable operators providing telecommunications services be extended to all CLECs, including those not owned by or affiliated with a cable corporation.[17]

Currently, the FCC's authority does not extend to ILEC attachments on power poles.[18] We recommend that the pole attachment formula also be applied to ILECs since they are essentially "pole renters" outside of their home service area. With the right price and open access, all viable competitors should be able to access the "last mile," be they IXCs, ILECs, ALECs, or CLECs.

[17] California Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange.

While it would be politically difficult to accomplish, this standard rule and rate mechanism could also be applied to both municipalities and cooperatives. As both of these organizations begin to become involved in the telecommunications business and in the provision of broadband services, they should not be able to hold their citizens or constituents hostage to a single provider. The necessity of providing these groups an exemption from pole attachment rules has diminished considerably and true competition will dictate that all the competitors, in all areas, have an equal opportunity to provide service. Islands of regulatory exception will only serve to segregate market development (see Attachment G).

[18] City of Abilene vs. FCC, No. 97-1633 and No. 97-1634, Petition for Reconsideration, February 19, 1999, pg. 3.



OTHER ISSUES

Nondiscriminatory access should be required to any pole. Certain engineering and safety concerns could restrict access, but there should be a presumption of accessibility that could only be overcome through a credible demonstration by the pole owner. Time certain deadlines for handling applications and make-ready should be imposed. Effective sanctions should be put in place to ensure timely adherence to enacted regulation.

For rearrangement inspection and make-ready costs, the attacher should only be responsible for actual and reasonable costs. The new attacher should only be responsible for the costs of necessary make-ready changes and should not be held liable for any cost to correct pre-existing safety violations.

It should be illegal for a pole owner to require that lines be deeded to the utility, or that pole owners can require that only their employees or their independent contractors can conduct attachment work. It should also be illegal to preclude overlashing, unless there is a credible showing that restriction is warranted for reasons of safety or engineering capacity. Eviction from poles should only be allowed following a showing of just cause

and with specific authorization of the State commission.

Companies such as Gemini Networks[19] need reasonable access to poles to build their network. They claim that "securing pole access is a slow, burdensome process despite nondiscriminatory access requirements."[20] Gemini claims that the turn around time for processing make-ready invoices and paying ILECs is between one and two days. Gemini states that the average turn-around time for granting pole licenses is 141 days (45 day federal limit).[21] Rules should include certain deadlines and sufficient sanction to promote compliance.[22]

Pole owners may require applicants to post a security bond prior to submittal of a license application. This "bond barrier" should not be permitted unless there is a credible basis for concluding that the applicant may not be able to satisfy its obligations. Bonding requirements should be based on a demonstrated history of late or non-payment. There should be a nexus between the bond requirement and the costs that the pole owner will incur.

Pole owners should not be permitted to recover the costs of correcting pre-existing pole violations solely from new licensees. The costs to correct these violations should be

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[19] www.gemnets.com. Note: Reed Hundt is on the Board of Directors.

[20] Gemini Networks presentation, July 2000, pg. 18.

[21] Id. pg. 19.

[22] See Attachment M.

assessed on the existing attachers and not to the new licensee. Pole attachment agreements should include conditions which specify a method for allocating the costs of modifications among the different parties. Parties effected should also be able to recoup a portion of these costs from subsequent licensees who benefit from required modifications.

Pole owners should only be permitted to recover reasonable, documented and verifiable costs for field survey work. In order to avoid excessive make-ready expense, only reasonable and actual expense should be allowed. Fees should be adequately substantiated and flat per-pole fees should not be allowed, as they usually have little relation to the actual costs to be incurred. Charges for field surveys and the preparation of make-ready estimates should be fully disclosed in advance. Billing for service should only take place upon completion of the work and determination of actual costs.

Pole owners should streamline state wide agreements for pole attachments. It is inefficient to have separate agreements for different areas within a state and can lead to unnecessary expense for the attachers. There should be a single agreement that covers all areas controlled by a utility.

License applications differ significantly among different pole owners and even differ in separate areas controlled by a single utility. Pole owners, to as great an extent as possible, should adopt a uniform license application. While unique local circumstances may necessitate special language in a application, the majority of conditions for these applications can be standardized in an attempt to expedite the process and minimize the cost.

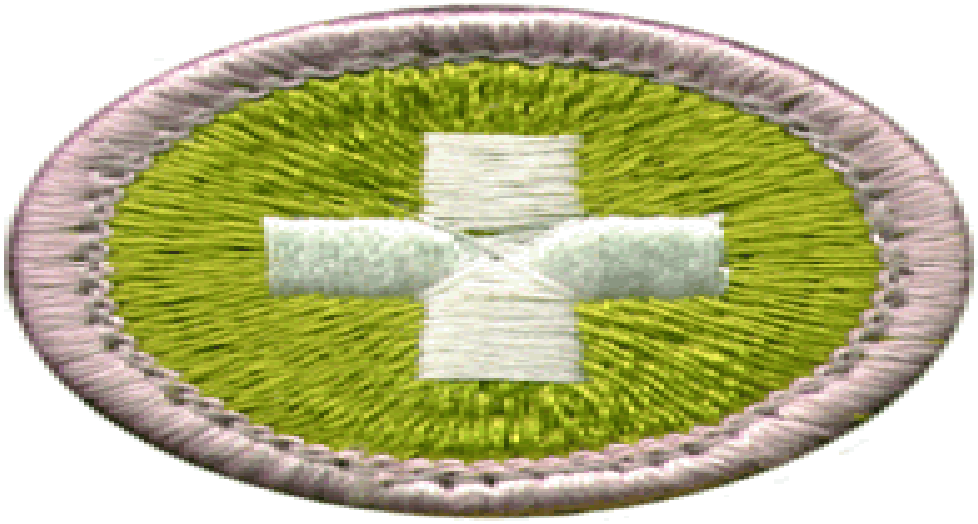
In order to facilitate the application process, pole owners should be required to provide license applicants access to their maps and other information that could expedite the application process. This information can be invaluable to license applicants who are required to specify the poles, conduits and rights-of-way to which they require access. Making each potential attacher "rediscover" information that is already compiled by the pole owners is expensive and redundant.

Pole owners should not unilaterally impose artificially low limits on the number of applications that may be filed at one time. Unreasonable restrictions on the number of applications can prevent the rapid deployment of new networks.

Pole owners should be required to give sufficient advanced notice to existing attachers that modifications to poles is planned. With this knowledge, attachers can gauge the potential savings of making concurrent modifications to their attachments.

In situations where poles are jointly owned, these parties should process license applications in a coordinated fashion and only require that one application and one application fee be submitted. Joint owners should be required to work together to avoid unnecessary delays and to coordinate their decision making process.

We also recommend that rates and terms agreed upon by the parties should either be readily available in tariffs, or in the alternative, allow the contracts to be posted on the Internet so that all parties will have an opportunity to verify charges and adopt contract solutions on a nondiscriminatory basis.



PUBLIC SAFETY

Poles go up. Poles come down. In an attempt to protect the public from faulty pole construction or attachments, a number of jurisdictions in the United States have developed programs for pole inspection. Be it reliance on internal utility inspection, building code inspectors, or reporting of pole problems by rate payers, it is vitally important that these facilities be monitored. Several States have instituted online reporting of pole problems.[23] See Attachment I for further information on the Florida inspection program.

[23] http://homepages.go.com/~samait/forms/technology.htm.

CONCLUSION

Today, cable and telephone companies face a challenge to their monopoly local exchange market from facilities based competitors that must attain access to poles and conduits. The incentives for incumbents to impede competition, be it through action at the FCC, unreasonable business practice, or court action, has magnified in the last few years.

The purpose of the 1996 Act is to encourage investment in competing facilities. If pole rents are artificially high, the cost of line extensions becomes uneconomic. This can dramatically effect all areas, especially rural areas with lower density of subscribers and greater number of poles per customer. Lower pole attachment rates are an incentive to attract facilities based competition. Lower, yet reasonable, attachment rates will allow cash strapped CLEC's the opportunity to reinvest revenue in facility upgrades instead of paying rent. When determining fair rent for pole attachment, one should always be cognizant of the fact that pole and conduit facilities are frequently recovered through regulated rates, or in other words, already in rate base. Add to this equation the fact that a vast majority of these poles sit on right-of-way that was either fully contributed to the utility or leased at a discounted rate. Considering these factors, one begins to understand that the general public has an ownership interest in these poles and should benefit accordingly. Be it the benefit of greater facilities based competition, the benefit of rapid deployment of advanced services or be it the public benefit of avoiding expensive litigation costs, a mechanism must be maintained that ascertains a reasonable rate for pole attachment and provides an efficient method for complaint resolution. We believe this has already been accomplished at the FCC.

When it comes to pole attachments, why don't the utilities agree? Well, it's because there is an incentive for pole owners who want to get into the telecommunications and Internet business to forestall the efforts of others. It's not so much the rate of the rent, but rather how much time can be gained by erecting a cost barrier. For power companies, pole rental income is a rounding error on their financial statements. But, if they can corner a telecommunications market with their monopoly position over the "last mile," they could significantly improve their bottom line. There is abundant incentive to overprice, delay, and or file court action if these tactics will buy time for pole owners to develop a broadband business plan. This is fundamentally unfair to those currently implementing a business plan of their own and to the public who is victimized by retarded deployment of advanced services. Stewardship of public resources should be the primary concern of pole owners and policy makers alike. Increasing the rent for these resources by as much 600% is neither fair to competitors nor to the public.[24]

The potential economic effect of pole attachment rates has been described by some commentators as the "biggest sleeper" issue in telecommunications. If the owners of the estimated 90 million poles[25] in America were able to charge $38 per pole attachment, as requested by Gulf Power in Northwest Florida,[26] instead of the national average of $6, the annual impact could be as great as $3 billion per year. Increased costs such as these could adversely affect economic development, educational opportunities and the quality of life in

[24] See Attachment H.

[25] Robert Guy Matthews, The Wall Street Journal. Four million poles per year need to be replaced because of routine maintenance, accidents and construction.

the entire nation. Quantifying the effects of inhibited competition is difficult, if not impossible to do, but it is easy to understand that issues involving the deployment of advanced services and access to last mile infrastructure are of paramount importance.

[26] See Attachment H.