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333 OAK LANE  
BLOOMSBURG, PA 17815  
SCOTT.J.RUBIN@GMAIL.COM

SCOTT J. RUBIN  
ATTORNEY • CONSULTANT

TEL: (570) 387-1893  
FAX: (570) 387-1894  
CELL: (570) 850-9317

October 29, 2018

Rosemary Chiavetta, Secretary  
Pa. Public Utility Commission  
P.O. Box 3265  
Harrisburg PA 17105-3265



Re: Assumption of Commission Jurisdiction Over Pole  
Attachments from the Federal Communications  
Commission, Docket No. L-2018-3002672

Dear Secretary Chiavetta:

Enclosed for filing please find Comments of Communications Workers of America in the  
above-referenced proceeding.

The document was filed electronically with the Commission on this date.

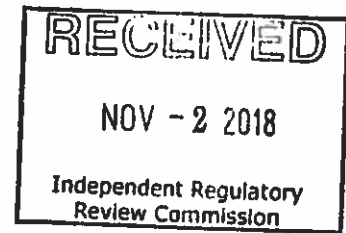
Sincerely,

A handwritten signature in black ink, appearing to read "Scott J. Rubin".

Enclosure

cc: Colin W. Scott, Bureau of Technical Utility Services (email to: colinscott@pa.gov)  
Shaun A. Sparks, Law Bureau (email to: shsparks@pa.gov)

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Assumption of Commission Jurisdiction over Pole  
Attachments from the Federal Communications  
Commission

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Docket No. L-2018-3002672

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COMMENTS OF COMMUNICATIONS WORKERS OF AMERICA

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The Communications Workers of America ("CWA") appreciates the opportunity to submit these Comments in response to the Notice of Proposed Rulemaking Order ("NOPR") issued by the Pennsylvania Public Utility Commission ("Commission") on July 12, 2018, and subsequently published for public comment.<sup>1</sup>

**1. Introduction and Background**

CWA represents more than 5,000 employees of incumbent local exchange carriers ("ILECs") in Pennsylvania, including Verizon, Frontier, CenturyLink, Windstream, and Consolidated. CWA submits these Comments to represent the interests of its members both as employees and customers of Pennsylvania's landline telecommunications carriers.

As CWA will explain more fully below, CWA agrees that the Commission should assume jurisdiction from the Federal Communications Commission ("FCC") over pole attachment rates and procedures. For many years, the FCC has engaged in reasonable rate-setting for pole attachments and adopted reasonable regulations setting forth the general procedures for telecommunications carriers to attach to utility poles.

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<sup>1</sup> 48 Pa. Bulletin 6273 (Sept. 29, 2018).

Recently, however, the FCC substantially modified its regulations governing the procedures for attaching to poles. Those regulations are not consistent with the provision of safe facilities to the public in general or to utility employees in particular. Importantly, the FCC's significant regulatory changes were adopted after this Commission issued its NOPR. Consequently, as CWA explains below, the Commission's wholesale adoption of the FCC's newly effective pole-attachment regulations is not consistent with Pennsylvania law or the Commission's obligation to ensure the safety of utility facilities.

## **2. CWA Supports the Commission's Assumption of Jurisdiction**

CWA supports the Commission's assumption of jurisdiction over pole attachment rates and procedures. The Commission has an obligation to ensure the safety of utility poles and the facilities attached to those poles. Importantly, this Commission's jurisdiction expressly covers the safety of utility employees who must work on and maintain those poles and facilities. Specifically, Section 1501 of the Public Utility Code requires every public utility to "make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public."<sup>2</sup>

Section 1505 of the Code gives the Commission the authority to enforce Section 1501 and to issue orders and regulations that prescribe "repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public."<sup>3</sup>

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<sup>2</sup> 66 Pa. C.S. § 1501 (emphasis added).

<sup>3</sup> 66 Pa. C.S. § 1505(a).

CWA supports the Commission's assumption of pole-attachment jurisdiction as an appropriate exercise of its authority under Section 1505 to regulate alterations and repairs to utility poles and facilities attached to those poles.

**3. The Commission's Wholesale Adoption of the FCC's Pole-Attachment Regulations is Not Consistent with Pennsylvania Law or With the Commission's Obligation to Ensure the Safety of Utility Facilities**

**a. Introduction**

The Commission issued its NOPR on July 12, 2018. At that time, it was reasonable for the Commission to adopt the FCC's then-existing pole-attachment regulations, at least as an interim measure until Pennsylvania-specific regulations could be developed. At the time, the FCC's regulations were codified at 47 CFR §§ 1.1401 to 1.1425, as cited in proposed section 77.4 of the Commission's regulations (Annex A to the NOPR).

Subsequent to the issuance of the NOPR, however, the FCC promulgated significant changes to its pole-attachment regulations, such that many of the regulations this Commission thought it was adopting are no longer in effect. Indeed, seven sections were eliminated from the FCC's regulations, and substantial changes were made in the remaining sections, such that the FCC's regulations are now codified at 47 CFR §§ 1.1401 to 1.1415.

Specifically, on August 3, 2018, the FCC adopted a Report and Order and Declaratory Ruling that dramatically changed its pole-attachment regulations.<sup>4</sup> The relevant regulatory language was subsequently published in the *Federal Register* on September 4 and September 14, each with an effective date 30 days after publication.<sup>5</sup> Thus, as of October 15, 2018, new FCC pole-attachment regulations are in effect. As CWA will explain below, several of the changes made in the FCC's regulations are not consistent with the obligations placed on Pennsylvania

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<sup>4</sup> *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, FCC 18-111 (Aug. 3, 2018).

<sup>5</sup> 83 Fed. Reg. 44831 (Sept. 4, 2018) and 83 Fed. Reg. 46812 (Sept. 14, 2018).

utilities and this Commission to ensure the safety of public utility employees and the facilities they maintain.

Before discussing the new provisions in the FCC's regulations that are not consistent with Pennsylvania law and do not adequately protect public safety, CWA would note that while the FCC's regulations have been promulgated, they are far from settled. Several utilities have petitioned the FCC to reconsider its order, a first step in what is likely to be a lengthy appeal process. In addition, numerous municipalities are concerned that the FCC is attempting to preempt local zoning and land use controls regarding pole attachments, and a challenge already has been initiated by one city in the U.S. Court of Appeals for the Ninth Circuit.<sup>6</sup>

**b. Regulation by Reference to Non-Binding Federal Regulations  
Violates the Commonwealth Documents Law, Regulatory Review  
Act, and Commonwealth Attorneys Act**

CWA submits that it is not consistent with the Commonwealth Documents Law,<sup>7</sup> the Regulatory Review Act,<sup>8</sup> and the Commonwealth Attorneys Act<sup>9</sup> for an agency's binding regulation to change automatically when another document is modified. Generally, the law requires that the full text of any substantive change in a regulation be published for public comment and provided to the relevant legislative committees, the Attorney General, and the Independent Regulatory Review Commission. Allowing the regulation to change automatically because of an action by the FCC (particularly one that is not binding on the Commonwealth due to the Commission's adoption of reverse pre-emption) would be in violation of the publication and review requirements of Pennsylvania law.

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<sup>6</sup> *City of Portland, Oregon v. FCC*, U.S. Court of Appeals for Ninth Circuit, Case No. 18-72689, Petition for Review filed Oct. 2, 2018.

<sup>7</sup> 45 P.S. §§ 1102, *et seq.*

<sup>8</sup> 71 P.S. §§ 745.1, *et seq.*

<sup>9</sup> 71 P.S. §§ 732-101, *et seq.*

Indeed, the current circumstance is a prime example of that problem. When the Commission adopted its order on July 12, the FCC's regulations consisted of 22 sections,<sup>10</sup> had been in effect for several years, were well understood by the industry, and were largely non-controversial. If the Commission's proposed regulations had simply copied the then-existing FCC regulations (rather than attempting to incorporate them by reference), CWA would have had no issue with their adoption.

Now, however, because of the Commission's attempt to regulate by reference to another document, rather than fully setting forth the text of the regulation for comment as required by law, the effect is very different, as described below. In fact, it is unclear whether the Commission even knew the specific regulations it was proposing to adopt, which would be directly contrary to the Commonwealth Document Law's requirement that an agency take action to adopt the text of a proposed regulation.<sup>11</sup>

CWA submits, therefore, that the Commission should delete proposed section 77.4 and replace it with the verbatim text of the FCC's pole-attachment regulations as they existed on July 12, 2018, when the Commission voted to adopt those regulations. For ease of reference, CWA provides the full text of the FCC's then-existing regulations as Appendix A to these Comments.

The following discussion highlights specific sections of the FCC's new pole-attachment regulations that CWA submits are not consistent with Pennsylvania law, the assurance of public and worker safety, or sound public policy.

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<sup>10</sup> The FCC's regulations were codified as 47 CFR §§ 1.1401 to 1.1425, but sections 1.1419, 1.1421, and 1.1423 were not used.

<sup>11</sup> 45 P.S. § 1201 provides in relevant part: "an agency shall give ... public notice of its intention to promulgate, amend or repeal any administrative regulation. Such notice shall include:

(1) The text of the proposed administrative regulation ... prepared in such a manner as to indicate the words to be added or deleted from the presently effective text thereof, if any."

**c. The FCC's new regulations for make-ready work do not comply with Pennsylvania law and cannot be adopted by this Commission**

On July 12, 2018, the FCC's regulations required a pole owner (termed a "utility" in the FCC's regulations) to give 60 days' written notice to each owner of facilities attached to a pole before making "any modification of facilities other than routine maintenance or modification in response to emergencies."<sup>12</sup> This is a reasonable, common-sense requirement that places responsibility for utility facilities where it belongs, with the telecommunications carrier or cable company that owns the facilities and uses them to serve the public.<sup>13</sup> The then-existing FCC regulations also gave existing pole attachers 60 days to perform the make-ready work. If they failed to complete the work within 60 days, then the new attacher could hire a contractor from an approved list kept by the pole owner to perform the work.<sup>14</sup>

As of October 15, 2018, however, the FCC changed this regulation to no longer require 60 days' advance notice when "make-ready" work is to be performed.<sup>15</sup> "Make-ready" work is defined as "the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole."<sup>16</sup>

For make-ready work, the FCC adopted a new version of Section 1.1420 and relabeled it Section 1.1411. Where the make-ready work is complex, the new regulation reduced the time period for a pole attacher to move its facilities to only 30 days, unless more than 300 poles are involved (in which case up to 75 days is allowed).<sup>17</sup> CWA submits it is grossly unreasonable to

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<sup>12</sup> 47 CFR § 1.1403(c)(3), prior to October 15, 2018.

<sup>13</sup> For ease of reference, CWA will refer to telecommunications carriers and cable companies as "pole attachers."

<sup>14</sup> 47 CFR § 1.1422, prior to October 15, 2018.

<sup>15</sup> 47 CFR § 1.1403(c)(3), effective October 15, 2018.

<sup>16</sup> 47 CFR § 1.1402(o), effective October 15, 2018.

<sup>17</sup> 47 CFR § 1.1411(e)(1), effective October 15, 2018. If more than 3,000 poles are involved in an application, then the pole owner and new pole attacher are to negotiate a reasonable time period for completion. 47 CFR § 1.1411(g)(4).

believe that existing pole attachers can complete complex relocations on potentially 200 or more poles within a 30-day time period, and there has been no demonstration that this can be done.

Moreover, the new regulation permits a new pole attacher to perform “simple make-ready” work on its own, without providing adequate notice to the owners of the facilities that would be relocated. The FCC defines “simple make-ready” to be “make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.”<sup>18</sup> Rather incredibly, the new pole attacher and the pole owner are the parties who determine whether make-ready work on other utilities’ facilities would be “simple.”<sup>19</sup> Existing pole attachers – the very entities whose facilities would be relocated – are not even given notice that this process is occurring. In addition, the pole owner is given only 15 days to review the new attacher’s claim that the make-ready work would be simple.<sup>20</sup>

CWA disagrees that any pole attachment work is “simple.” Pole attachment work is complex and, if done incorrectly, can lead to dangerous conditions for workers and the public. In the communication space, unskilled work could leave heavy cables and terminals hanging without proper support. Ungrounded wires could cause electrocution risks. Incorrect placement or overloading equipment on damaged or decaying poles could lead to poles falling into private property or the public right-of-way. Just 20 feet of a large communications cable could weigh 200 pounds or more and the failure of unqualified contractors to secure it properly can result in serious public safety hazards, as CWA has seen first-hand.

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<sup>18</sup> 47 CFR § 1.1402(p), effective October 15, 2018 (complex work would be make-ready that is not simple).

<sup>19</sup> 47 CFR § 1.1411(j)(1)(i), effective October 15, 2018.

<sup>20</sup> 47 CFR § 1.1411(j)(2)(ii), effective October 15, 2018.



Compounding these serious problems is the fact that, unlike under the FCC's prior regulations, the new regulations do not even require contractors performing "simple" make-ready work to be selected from an approved list.<sup>21</sup> This is extremely problematic. CWA has experience with unvetted contractors performing make-ready work in other jurisdictions and the results have caused hazardous conditions. Reports from CWA members disclose a wide array of safety and service issues caused by third parties who move ILEC facilities without being fully qualified to do so. CWA members report instances of ungrounded strands creating an electrocution risk to the public and utility workers; weak bolts that will snap or come loose causing cable to sag close to the ground; cable improperly supported such that any additional weight (such as ice or snow) will cause the cable to sag or break; and other unsafe conditions.

CWA would reiterate that there is no such thing as a "simple" cable relocation. Such work must be performed by highly skilled line workers who have been trained to understand the hazards of working with these potentially dangerous facilities.

When "simple" make-ready work is to be performed, a new pole attacher needs to notify existing pole attachers only 15 days before the work is performed, and the existing pole attacher is not given any rights to object or say that it will perform the work itself.<sup>22</sup>

This process is directly contrary to Pennsylvania law that requires utilities to be responsible for the maintenance and repair of their own facilities. As noted above, Section 1501 of the Code places the obligation on utilities to control and maintain their own facilities; it does not give anyone other than the utility that right.<sup>23</sup>

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<sup>21</sup> 47 CFR § 1.1412(b), effective October 15, 2018.

<sup>22</sup> 47 CFR § 1.1411(j)(4), effective October 15, 2018.

<sup>23</sup> 66 Pa. C.S. § 1501 ("Every public utility ... shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.")

Moreover, for nearly a century, Pennsylvania law has limited the power of the Commission to manage how a utility does business, as explained by the Superior Court in 1943:

While a business charged with public interest such as a utility is the proper subject of regulation, the State's powers in this respect are not without limitation. In *Banton v. Belt Line Ry. Corporation*, 268 U.S. 413, 45 S. Ct. 534, 69 L. Ed. 1020, it is said: "Broad as is its power to regulate, the state does not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners." See also, *Chi. Mil. & St. P. R. R. v. Wisconsin*, 238 U.S. 491, 59 L. Ed. 1423, 35 S. Ct. 869. Management cannot be justified under the guise of regulation and we should be slow to interfere with practices adopted by those whose successful life experience well qualify them to determine what methods of operation will work a general improvement of the service. These principles are given full recognition in the decisions of our State. In *Coplay Cement Mfg. Co. v. Pub. Ser. Co.*, 271 Pa. 58, 114 A. 649, our Supreme Court said: "It was not intended by the legislature that the commission should be a board of managers to conduct and control the affairs of public service companies, but it was meant that where certain of their powers and obligations had intimate relation to the public through fairness, accommodation or convenience, the commission should have an inquisitorial and corrective authority to regulate and control the utility in the field specifically brought within the commission's jurisdiction . . . . The rights, powers and privileges not mentioned constitute by far the greater part of corporate life, internal management, control and discretionary power over its property, the proper application, enforcement and enjoyment of the same matters submitted to the commission's control being among them. In short, the company manages its own affairs to the fullest extent consistent with the protection of the public's interest, and only as to such matters is the commission authorized to intervene, and then only for the special purposes mentioned in the act." "The Public Utility Commission is not a super board of directors for the public utility companies of the State and it has no right of management of them. Its sole power is to see that in the matter of rates, service and facilities, their treatment of the public is fair": *Bell Tel. Co. of Pa. v. Driscoll*, 343 Pa. 109, 21 A.2d 912.<sup>24</sup>

As the Superior Court explained in detail, Pennsylvania law requires utilities to control their own property. While Section 1505 gives the Commission the power to review the condition of that property and order corrective action, the Commission cannot issue an order or promulgate a regulation that cedes control of utility property to another, unspecified company. Yet that is

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<sup>24</sup> *Pa. Tel. Corp. v. Pa. PUC*, 153 Pa. Super. 316, 325-26, 33 A.2d 765, 770 (1943) (emphases added).

exactly what the FCC's new regulation attempts to do: it removes the ability of telecommunications utilities to control their own property.

In addition, if this Commission were to adopt the FCC's "simple" make-ready regulations, it would violate existing collective-bargaining agreements between CWA and various ILECs in Pennsylvania. Generally under those collective-bargaining agreements, the ILECs can allow someone other than a utility employee to perform work on the ILEC's poles and attached facilities only if CWA members are not able or available to perform the work. There also are some circumstances, such as Verizon's fiber optic cables, where only highly trained CWA members are permitted to work on the facility.

Indeed, when allegedly "simple" make-ready work is involved, the FCC's new regulations purport to limit the rights of existing pole attachers to the receipt of a 15-day notice that includes "the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide[s] the affected utility and existing attachers a reasonable opportunity to be present for any make-ready."<sup>25</sup> Incredibly, the regulation provides that there are only two circumstances when an existing attacher is allowed to control its own facilities: (1) if the new attacher damages the existing pole attacher's equipment "or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher;"<sup>26</sup> or (2) if within two weeks after the work is completed, the existing attacher finds that the work damaged the existing attacher's facilities or caused a "code violation."<sup>27</sup>

This procedure is woefully inadequate. The FCC's regulations do not provide for any penalties against pole attachers or their contractors when unsafe or substandard work is

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<sup>25</sup> 47 CFR § 1.1411(j)(4)(i), effective October 15, 2018.

<sup>26</sup> 47 CFR § 1.1411(j)(4)(ii), effective October 15, 2018.

<sup>27</sup> 47 CFR § 1.1411(j)(5), effective October 15, 2018. The FCC's regulations do not define what it means by a "code violation."

performed. The only remedy addressed in the FCC's regulations is paying to fix the improper work. That assumes, of course, that the pole attacher and contractor can be reached and that there is some mechanism to force them to pay. No such mechanism is found in the regulations. Pole attachers using contractors to perform "simple" make-ready work are not required to post a bond or provide other financial security to ensure that work is performed properly. In CWA's experience in jurisdictions that already have implemented expedited procedures for allegedly "simple" make-ready work, pole attachers and their contractors may not be reachable, may dispute the need to take corrective action, or may not have the trained personnel available to do so. The existing attacher then would be responsible for correcting the safety hazard caused by the contractor, with a hope (but no guarantee) of being reimbursed for the cost.

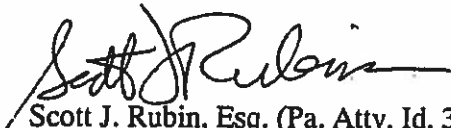
These provisions are not consistent with sound public policy in Pennsylvania and do not comply with long-standing Pennsylvania law. As explained above, this Commission does not have the authority to promulgate a regulation that prevents a utility from managing, controlling, and maintaining its own property. Needless to say, the Commission cannot adopt the FCC's new regulations if those regulations exceed the scope of the Commission's authority.

#### **4. Conclusion**

For the reasons set forth above, the Communications Workers of America respectfully requests the Commission to modify proposed section 77.4 to adopt the FCC's pole-attachment regulations as they existed on July 12, 2018, to set forth the text of those regulations verbatim, and to not automatically adopt future federal changes in regulations. Rather, any changes in Pennsylvania's pole-attachment regulations should comply with the provisions of Pennsylvania law, including requirements for public notice and comment, review by the relevant legislative

committees, and approval by the Attorney General and the Independent Regulatory Review Commission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott J. Rubin", with a long horizontal flourish extending to the right.

Scott J. Rubin, Esq. (Pa. Atty. Id. 34536)  
333 Oak Lane  
Bloomsburg, PA 17815-2036  
Phone: (570) 387-1893  
Email: scott.j.rubin@gmail.com

Counsel for  
Communications Workers of America

Dated: October 29, 2018

**Appendix A**  
**Text of FCC Pole Attachment Regulations (47 CFR Part 1, Subpart J)**  
**as of July 12, 2018**

**§ 1.1401 Purpose.**

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

**§ 1.1402 Definitions.**

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

(b) The term pole attachment means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(d) The term complaint means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term complainant means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

(f) The term respondent means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

(g) The term State means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term telecommunications carrier means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

(i) The term conduit means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term conduit system means a collection of one or more conduits together with their supporting infrastructure.

(k) The term duct means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term unusable space means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(m) The term attaching entity includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(n) The term inner-duct means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

**§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.**

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information

supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to:

- (1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement;
- (2) Any increase in pole attachment rates; or
- (3) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b). The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

(e) Cable operators must notify pole owners upon offering telecommunications services.

#### **§ 1.1404 Complaint.**

(a) The complaint shall contain the name, address, telephone number, and email address of the complainant; name, address, telephone number, and email address of the respondent; and a verification (in accordance with the requirements of § 1.52), signed by the complainant or officer thereof if complainant is a corporation, showing complainant's direct interest in the matter complained of. Counsel for the complainant may sign the complaint. Complainants may join together to file a joint complaint. Complaints filed by associations shall specifically identify each utility, cable television system operator, or telecommunications carrier who is a party to the complaint and shall be accompanied by a document from each identified member certifying that the complaint is being filed on its behalf.

(b) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.



(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

- (1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and
- (2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable.

(f) In any case, where it is claimed that a term or condition is unjust or unreasonable, the claim shall specify all information and argument relied upon to justify said claim.

(g) For attachments to poles, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim.

(1) The data and information shall include, where applicable:

- (i) The gross investment by the utility for pole lines;
- (ii) The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;
- (iii) The depreciation reserve from the gross pole line investment;
- (iv) The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;
- (v) The total number of poles:
  - (A) Owned; and
  - (B) Controlled or used by the utility. If any of these poles are jointly owned, the complaint shall specify the number of such jointly owned poles and the percentage of each joint pole or the number of equivalent poles owned by the subject utility;
- (vi) The total number of poles which are the subject of the complaint;
- (vii) The number of poles included in paragraph (g)(1)(vi) of this section that are controlled or used by the utility through lease between the utility and other owner(s), and the annual amounts paid by the utility for such rental;
- (viii) The number of poles included in paragraph (g)(1)(vi) of this section that are owned by the utility and that are leased to other users by the utility, and the annual amounts paid to the utility for such rental;
- (ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: Depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

(x) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return;

(xi) The average amount of usable space per pole for those poles used for pole attachments (13.5 feet may be in lieu of actual measurement, but may be rebutted);

(xii) The average amount of unusable space per pole for those poles used for pole attachments (a 24 foot presumption may be used in lieu of actual measurement, but the presumption may be rebutted); and

(xiii) Reimbursements received from CATV operators and telecommunications carriers for non-recurring costs.

(2) Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim.

(1) The data and information shall include, where applicable:

(i) The gross investment by the utility for conduit;

(ii) The accumulated depreciation from the gross conduit investment;

(iii) The system duct length or system conduit length and the method used to determine it;

(iv) The length of the conduit subject to the complaint;

(v) The number of ducts in the conduit subject to the complaint;

(vi) The number of inner-ducts in the duct occupied, if any. If there are no inner-ducts, the attachment is presumed to occupy one-half duct.

(vii) The annual carrying charges attributable to the cost of owning conduit. These charges may be expressed as a percentage of the net linear cost of a conduit. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes.

(viii) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of

return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further proceedings before the state regulatory body or a court. In the absence of a state authorized rate of return, the rate of return set by the Commission for local exchange carriers shall be used as a default rate of return; and

(ix) Reimbursements received by utilities from CATV operators and telecommunications carriers for non-recurring costs.

(2) Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(i) With respect to rights-of-way, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(j) If any of the information and data required in paragraphs (g), (h) and (i) of this section is not provided to the cable television operator or telecommunications carrier by the utility upon reasonable request, the cable television operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (g), (h) or (i) of this section, as applicable, after such reasonable request. A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier. The cable television operator or telecommunications carrier, in turn, shall submit these pages with its complaint. If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint.

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the

discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

(l) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 U.S.C. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

- (1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;
- (2) The basis for the complainant's claim that the denial of access is unlawful;
- (3) The remedy sought by the complainant;
- (4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and
- (5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

#### **§ 1.1405 File numbers.**

Each complaint which appears to be essentially complete under § 1.1404 will be accepted and assigned a file number. Such assignment is for administrative purposes only and does not necessarily mean that the complaint has been found to be in full compliance with other sections in this subpart. Petitions for temporary stay will also be assigned a file number upon receipt.

#### **§ 1.1406 Dismissal of complaints.**

(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to § 1.1414 of this subpart. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of § 1.1402(a) of this subpart.

(b) If the complaint does not contain substantially all the information required under § 1.1404 the Commission may dismiss the complaint or may require the complainant to file additional information. The complaint shall not be dismissed if the information is not available from public records or from the respondent utility after reasonable request.

(c) Failure by the complainant to respond to official correspondence or a request for additional information will be cause for dismissal.

(d) Dismissal under provisions of paragraph (b) of this section above will be with prejudice if the complaint has been dismissed previously. Such a complaint may be refiled no earlier than six months from the date it was so dismissed.

**§ 1.1407 Response and reply.**

(a) Respondent shall have 30 days from the date the complaint was filed within which to file a response. Complainant shall have 20 days from the date the response was filed within which to file a reply. Extensions of time to file are not contemplated unless justification is shown pursuant to § 1.46. Except as otherwise provided in § 1.1403, no other filings and no motions other than for extension of time will be considered unless authorized by the Commission. The response should set forth justification for the rate, term, or condition alleged in the complaint not to be just and reasonable. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts and exhibits shall be verified by the person who prepares them. The response, reply, and other pleadings may be signed by counsel.

(b) The response shall be served on the complainant and all parties listed in complainant's certificate of service.

(c) The reply shall be served on the respondent and all parties listed in respondent's certificate of service.

(d) Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

**§ 1.1408 Fee remittance; electronic filing; service; number of copies; form of pleadings; and proprietary materials.**

(a) The complainant shall remit separately the correct fee either by check, wire transfer, or electronically, in accordance with part 1, subpart G (see § 1.1106) and, shall file an original copy of the complaint, using the Commission's Electronic Comment Filing System. The original of the response and reply, as well as all other written submissions, shall be filed with the Commission using the Commission's Electronic Comment Filing System. Service must be made in accordance with the requirements of § 1.735(b), (c), (e), and (f).

(b) All papers filed in the complaint proceeding must be drawn in conformity with the requirements of §§ 1.49, 1.50, and 1.52.

(c) Any materials generated in the course of a pole attachment complaint proceeding may be designated as proprietary by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9). Any party asserting confidentiality for such materials must:

(1) Clearly mark each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the

materials designated as proprietary fall under the standards for nondisclosure enunciated in the FOIA.

(2) File with the Commission, using the Commission's Electronic Comment Filing System, a public version of the materials that redacts any proprietary information and clearly marks each page of the redacted public version with a header stating "Public Version." The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(3) File with the Secretary's Office an unredacted hard copy version of the materials that contains the proprietary information and clearly marks each page of the unredacted confidential version with a header stating "Confidential Version." The unredacted version must be filed on the same day as the redacted version.

(4) Serve one hard copy of the filed unredacted materials and one hard copy of the filed redacted materials on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §§ 1.47(g) and 1.735(f)(1) through (3) of this chapter;

(d) Except as provided in paragraph (e) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

- (1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;
- (2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;
- (3) Consultants or expert witnesses retained by the parties;
- (4) The Commission and its staff; and
- (5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(e) The Commission will entertain, subject to a proper showing under § 0.459 of this chapter, a party's request to further restrict access to proprietary information. Pursuant to § 0.459 of this chapter, the other parties will have an opportunity to respond to such requests. Requests and responses to requests may not be submitted by means of the Commission's Electronic Comment Filing System but instead must be filed under seal with the Office of the Secretary.

(f) The individuals identified in paragraphs (d)(1) through (3) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(g) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (d) and (e) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(h) Upon termination of the pole attachment complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

**§ 1.1409 Commission consideration of the complaint.**

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a prima facie case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a prima facie case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph (c), a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a prima facie case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{a Bare Pole}} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

in Service Areas where the number of Attaching Entities is 5 =  $0.66 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is 4 =  $0.56 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is 3 =  $0.44 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is 2 =  $0.31 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is not a whole number =  $N \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$ , where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

$$\text{Where Space Factor} = \left[ \frac{\left( \frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$



(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[ \frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}} \right]$$

$$\text{Where Space Factor} = \left[ \frac{\left( \frac{\text{Space}}{\text{Occupied}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\frac{\text{Maximum Rate per}}{\text{Linear ft./m.}} = \left[ \frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[ \frac{\text{No. of Ducts}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \right] \times \frac{\text{Carrying Charge Rate}}{\text{Rate}}$$

(Percentage of Conduit Capacity)                      (Net Linear Cost of a Conduit)

simplified as:

$$\frac{\text{Maximum Rate}}{\text{Per Linear ft./m.}} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Carrying Charge Rate}}{\text{Rate}}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

(g) A price cap company opting-out of part 32 of this chapter may calculate attachment rates for its poles, conduits, and rights of way using either part 32 accounting data or GAAP accounting data. A price cap company using GAAP accounting data to compute rates to attach to its poles, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP-based rates by an Implementation Rate Difference for each of the remaining years in the period. The Implementation Rate Difference means the difference between attachment rates calculated by the price cap carrier under part 32 and under

GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements.

#### **§ 1.1410 Remedies.**

If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

- (1) Terminate the unjust and/or unreasonable rate, term, or condition;
- (2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;
- (3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.

#### **§ 1.1411 Meetings and hearings.**

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

#### **§ 1.1412 Enforcement.**

If the respondent fails to obey any order imposed under this subpart, the Commission on its own motion or by motion of the complainant may order the respondent to show cause why it should not cease and desist from violating the Commission's order.

**§ 1.1413 Forfeiture.**

(a) If any person willfully fails to obey any order imposed under this subpart, or any Commission rule, or

(b) If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission pursuant to this subpart make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).

**§ 1.1414 State certification.**

(a) If the Commission does not receive certification from a state that:

- (1) It regulates rates, terms and conditions for pole attachments;
- (2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,
- (3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

(b) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(c) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(d) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

(e) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

- (1) Within 180 days after the complaint is filed with the state, or
- (2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

**§ 1.1415 Other orders.**

The Commission may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

**§ 1.1416 Imputation of rates; modification costs.**

(a) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

**§ 1.1417 Allocation of Unusable Space Costs.**

(a) With respect to the formula referenced in § 1.1409(e)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(b) All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in § 1.1409(e)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three (3). For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five (5). If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

(d) A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

#### **§ 1.1418 Use of presumptions in calculating the space factor.**

With respect to the formulas referenced in § 1.1409(e)(1) and § 1.1409(e)(2), the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

#### **§ 1.1420 Timeline for access to utility poles.**

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) Survey. A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) Estimate. Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) Make-ready. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

- (i) Specify where and what make-ready will be performed.
- (ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).
- (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
- (iv) State that the utility may assert its right to 15 additional days to complete make-ready.
- (v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.
- (vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

- (i) Specify where and what make-ready will be performed.
- (ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).
- (iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.
- (iv) State that the utility may assert its right to 15 additional days to complete make-ready.
- (v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

- (1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.
- (2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.
- (3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.
- (4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

#### **§ 1.1422 Contractors for survey and make-ready.**

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

#### **§ 1.1424 Complaints by incumbent local exchange carriers.**

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a rate, term, or condition for a utility pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

#### **§ 1.1425 Review period for pole access complaints.**

(a) Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission.

(b) The Enforcement Bureau shall have the discretion to pause the 180-day review period in situations where actions outside the Enforcement Bureau's control are responsible for delaying review of a pole access complaint.