

**Access to Poles, Ducts, Conduits and Rights-of-Way
By Cable and Telecommunications Companies**

A Primer for Electric Utilities

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Overview

The federal pole attachments regulatory regime is an *Alice in Wonderland* world, where nothing is as it seems.

- The *Pole Attachments Act* was passed in 1978 to give cable companies access to utility poles, yet access did not become mandatory until the passage of the *Telecommunications Act of 1996*.
- The FCC's rules concerning pole attachments establish a complaint and enforcement procedure that cable television companies and telecommunications carriers can use against utilities, but contain no procedure for utilities to seek relief from abuses by cable television companies and telecommunications carriers.
- The FCC officially encourages utilities and attachers to negotiate the rates, terms and conditions of their relationship, yet the FCC will entertain a complaint from the attacher even after the parties have negotiated and entered into an agreement.
- Unlike most federal regulation, where the federal government preempts regulation by the states, in the case of pole attachments the states can preempt regulation by the federal government. Eighteen states and the District of Columbia have elected to do so.

This primer attempts to collect in one place the more significant statutes, regulations, policy statements and case precedents. **THIS PRIMER IS NOT TO BE CONSIDERED LEGAL ADVICE FOR ANY PARTICULAR UTILITY THAT IS FACING ANY PARTICULAR FACTUAL OR LEGAL QUESTION.**

Regulation by Case Law.

Following the passage of Section 703 of the *Telecommunications Act of 1996*, which amended the pole attachment provisions contained in Section 224 of the *Communications Act of 1934*, the Federal Communications Commission (“FCC”) incorporated into its rules formulas for determining the maximum just and reasonable rental rate that a utility could charge for access to its poles, ducts and conduits by cable companies and telecommunications companies.

The FCC’s rules do not, however, set forth the requirements for the other terms and conditions of attachment. Instead, case precedent and policy statements in various proceedings contain the FCC’s views on these other terms and conditions of attachment.¹ Although the FCC regards this body of law as a “backdrop” for negotiation of individual pole attachment agreements, this backdrop has evolved into a body of pole attachment regulations. This Primer is a brief restatement of this backdrop of non-codified regulations.

Major Statutes, Regulations and Decisions.

Pole Attachments Are Governed by Section 224 of the *Communications Act of 1934*. (*The Pole Attachments Act*.)

- Section 224 was amended by the *Telecommunications Act of 1996*, § 703 (Public Law No. 104-104, 110 Stat.61, 149-151).
- The FCC has implemented the statute in **Part 1, Subpart J of its rules, §1.1401 et seq.**
- The FCC has issued the following major decisions:

(1) ***Local Competition Order***, FCC 96-325 (CC Docket 96-98 and CC Docket 95-185), 11 FCC Rcd 15499 (1996). (Established “five rules of general applicability” and several “guidelines.”) Affirmed in part in *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (January 25, 1999). *Order on Reconsideration*, FCC 99-266, released October 26, 1999, 1999 FCC Lexis 5303. Affirmed in part and reversed in part, ***Southern Company et al., v.***

¹Many of these case precedents, including several cited in this primer, are decisions of the former Cable Services Bureau, which do not carry the same weight as decisions of the Commissioners or reviewing courts. On March 25, 2002, responsibility for pole attachment complaints was transferred to the Commission’s Enforcement Bureau.

FCC, 293 F.3d 1338 (11th Circuit, 2002).

- (2) ***Self-Effectuating Order***, CS Docket 96-166, 11 FCC Rcd 9541 (1996) (as to the self-effectuating provisions of the *1996 Act* regarding cable TV regulations).
- (3) ***Telecom Order***, FCC 98-20, (CS Docket No. 97-151) Report and Order, released February 6, 1998, 11 CR 79, 63 Fed. Reg. 12013 (to implement the *Telecommunications Act of 1996* regarding charging telecommunications carriers for two-thirds of the cost of a pole's unusable space).
- (4) ***Fee Order***, FCC 00-116, (CS Docket No. 97-98) Report and Order released April 3, 2000. 65 Fed. Reg. 31270, May 17, 2000 (as to rental rate formulas and factors).
- (5) ***Reconsideration Order***, Consolidated Partial Order on Reconsideration (CS Docket Nos. 97-98 and 97-151), FCC 01-170, released May 25, 2001 (16 FCC Rcd 12103). Affirmed in ***Southern Company Services, Inc., v. F.C.C.***, 313 F.3d 574 (D.C. Cir. 2002).

States that Regulate Pole Attachments.

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

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

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

Definition of “Utility.”

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

In other words, an electric utility that does not allow any use of its poles, ducts, conduits, or rights-of-way for communications by wire (including its own, internal communications) is not a “utility” within the meaning of the statute and has no obligation to allow others to attach to its facilities. However, the use of *any* utility pole, duct, conduit or right-of-way triggers access to *all* poles, ducts, conduits and rights of way “owned or controlled” by the utility.

Electric cooperatives and municipal power utilities are specifically exempted from the definition.

When Access Can Be Denied.

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

A utility can, however, deny access to its poles, ducts, conduits or rights-of-way on the basis of a lack of capacity. Although the FCC had ruled that utilities were obligated to expand capacity if their present plant lacked capacity to support new attachments, the 11th Circuit Court of Appeals in *Southern Company et al., v. FCC*, reversed the FCC and held that “when it is agreed” that capacity is insufficient, there is no obligation to provide third parties with access to that particular pole, duct, conduit or right-of-way.

Relationship to Other Codes and Laws.

The FCC's pole attachment rules do not take precedence over FERC, OSHA or other federal regulations that deal with attachments. Nor do the FCC's pole attachment rules invalidate state and local requirements affecting pole attachments. Even if a particular state has not preempted the FCC's jurisdiction by certifying that it regulates pole attachments, any state or local pole attachment requirements are entitled to deference.

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

Non-discrimination and Preferential Treatment.

Where access is mandatory, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Note, however, that there is an exception for incumbent local exchange carriers. A utility is not obliged to grant nondiscriminatory access to an incumbent local exchange telephone company.

A utility may not favor itself over other parties with respect to the provision of telecommunications or cable services. A utility must impute to itself or its affiliate, subsidiary or associate company the pole attachment rate such entity would be charged were it a non-affiliated entity.

Just and Reasonable Compensation.

Parties may mutually agree to any rental rate for attachments to poles or placements in conduits. In the *Telecom Order* the FCC reaffirmed its preference for negotiated agreements. In general, rates must be just and reasonable.

A rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing attachments (its “incremental costs”), nor more than its “fully allocated cost,” that is, an amount determined by multiplying the percentage of the total usable pole space, or the percentage of the total duct or conduit capacity, which is occupied by the attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

a. Incremental Costs

- Examples of incremental costs are:
- Pre-construction survey costs;
- Engineering costs;
- Make-ready and change-out costs incurred in preparing poles to receive attachments.

b. Fully Allocated Costs

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

c. Fees

Separate fees to recover recurring costs can be charged, but only if these fees are not already included in the rate calculation based on fully allocated costs. Such fees would include charges for application processing or periodic inspections. See, *Texas Cable and Telecommunications Association v. GTE Southwest Incorporated* (DA 99-348, released February 18, 1999), holding that the utility could not charge a “billing event fee” of \$25, a pole attachment origination fee of \$400 and a license assignment fee of \$200, because these fees are included in the carrying charges factor that goes into the maximum rate formula.

See, also, *Texas Cable and Telecommunications Association et al. v. Entergy Services, Inc.*, (DA 99-1118, released June 9, 1999), holding that the utility could not charge an up-front \$10 per pole “engineering survey fee,” although the utility could seek reimbursement of the actual cost of engineering surveys. Nor could the utility impose a flat fee of \$5,000 for origination of a new pole attachment agreement and \$2,000 for a major expansion of the cable system. These administrative costs are already reflected in the FERC accounts that are part of the rate calculations and the utility may not recover these costs a second time.

d. Rental Formulas

1. Pole Attachments

In February, 1998, the FCC prescribed new regulations to determine just and reasonable attachment rates for use in resolving complaints. These rules became effective on February 8, 2001. However, if the application of these new rules will result in any increase of pole attachment rates charged to cable TV companies from those now in effect, the increase must be phased-in over 5 years. Any decrease must be applied immediately.

There are two formulas that govern the maximum pole attachment rate. One applies to attachments by cable TV companies for the provision solely of cable TV service. The other applies to attachments by telecommunications carriers and cable TV companies providing telecommunications service in addition to cable TV service. The difference between the two formulas is that cable TV companies providing solely cable TV service can be charged only for their share of the usable space on a pole. Telecommunications carriers and cable TV companies that provide telecommunications service in addition to cable TV service, can also be charged for a share of the unusable space on a pole.²

a. The cable formula for pole attachment rental is as follows:

$$\text{Maximum Rate} = [\text{Space Occupied by Attachment} \div \text{Total Usable Space}] \times [\text{Net Pole Investment} \div \text{Total Number of Poles}] \times 0.85 \times [\text{Carrying Charge Rate}]$$

b. The telecommunications formula for pole attachment rental is as follows:

$$\text{Maximum Rate} = \{[\text{Space Occupied}] + [_ \times (\text{Unusable Space} \div \text{Number of Attachers})]\} \times [\text{Net Pole Investment} \div \text{Number of Poles}] \times [\text{Carrying Charge Rate}]$$

Presumptions

² The FCC's formulas have been challenged by several utilities, who have argued that the rental rates produced by these formulas do not result in sufficient compensation to avoid a "taking" under the Fifth Amendment to the U.S. Constitution. To date, the FCC's formulas have withstood challenge. See, for example, *Alabama Power Company v. F.C.C.*, 2002 U.S. App. LEXIS 23575 (11th Circuit, 2002).

In lieu of actual measurements, 13.5 feet may be used as the average amount of usable space per pole for those poles used for pole attachments. The figure of 24 feet may be used as the average amount of unusable space on a pole. The figure of 18 feet may be used as the average pole space reserved for ground clearance. The figure of 37.5 feet may be used as the average height of a pole. The figure of 1 foot may be used as the presumptive amount of space occupied by an attachment on a pole (even if the attachment has been overlashed). The figure of 3 may be used as the number of attaching entities in non-urban areas and 5 may be used as the number of attaching entities in urban areas. These figures may, however, be rebutted by factual showings.

The factors in the above formulas, such as “Net Pole Investment” and “Carrying Charge Rate,” are explained in considerably greater detail in the *Fee Order* as well as the *Reconsideration Order*. See especially Appendices D-2 and E-2 to the *Reconsideration Order*. These formulas draw on standard accounts using FERC Form No.1 data.³

2. Conduit Occupancy

There is a separate formula for conduits. The formula applies to cable TV (CATV) companies, regardless of whether or not they are providing solely cable TV service, as well as to telecommunications companies. The formula is:

$$\text{Maximum Rate per Linear Foot or Meter} = [(1 \div \text{Number of Ducts}) \times (1 \text{ Duct} \div \text{Number of Inner Ducts})] \times [(\text{Number of Ducts}) \times (\text{Net Conduit Investment} \div \text{System Duct Length in Feet or Meters})] \times [\text{Carrying Charge Rate}]$$

Note: If no inner duct is installed, the factor “1 Duct ÷ Number of Inner Ducts” is presumed to be _.)

The FCC in the *Reconsideration Order* concluded that there is no unusable space in a conduit. Therefore the formula for all cable attachers is the same as the formula for telecommunications attachers. See Appendix F-2 to this decision for more information as to the operation of this formula. (Note: this issue is currently on appeal before the D.C. Circuit.)

³ The “Net Pole Investment” factor for electric utilities is somewhat different from the Net Pole Investment factor for telephone utilities. This reflects a typically greater use of crossarms and other non-pole related items by electric utilities.

Presumptions

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

3. Rights-of-Way

There is no formula that governs access to rights-of-way. However, the access and reasonable rate provisions of Section 224 of the Communications Act apply where a cable TV company or a telecommunications carrier seeks to install facilities in a right of way but without physical attachment to a pole, duct or conduit. In the *Telecom Order*, the FCC elected to handle any complaints that might be filed on a case-by-case basis.

Charging for New Attachment Requests.

When a potential new attacher inquires as to the availability of pole or conduit capacity the utility can charge for developing and providing this information. The utility may recover its actual labor and administrative costs for providing maps, plats and other data. However, the FCC expects the utility to have a standard quote for such service. Only in the case of an unusually expensive request could the standard rate be exceeded. The utility is required to take reasonable steps to protect proprietary information.

No Charges for Non-video Services by Cable Companies.

A utility cannot charge extra when a cable company uses its facilities to deliver non-video service to customers. In the case of *Marcus Cable Associates, LP v. Texas Utilities Electric Company*, FCC 03-173, released July 28, 2003, the FCC affirmed the decision of its former Cable Services Bureau, which had ruled that the nature of transmissions on the cable was irrelevant. The utility had no right to an additional fee, such as a share of the revenues, when the cable company made capacity available to others. However, for purposes of applying the formulas that took effect February 8, 2001, the utility has the right to know whether or not the cable company is providing solely cable service. If the cable company is also providing telecommunications services, it could also be charged for its share of the unusable space on a pole. Indeed, the cable company is required under the FCC's regulations to notify pole owners upon offering

telecommunications services.

No Charges for Providing Internet Service.

Many cable TV companies offer Internet access over their cable system using cable modems. Telecommunications carriers also are offering Internet service. The Supreme Court in *Gulf Power II*, (*National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 122 S. Ct. 782 (2002)) held that the provision of Internet service by a cable company or a telecommunications company does not disqualify its pole attachment rights. Therefore, the formula that would normally be applicable to these companies is applicable, regardless of their use of their facilities to provide Internet access.

No Charges for Overlapping Existing Attachments.

Overlapping one's own pole attachment must be permitted without additional charge. If, however, an engineering study demonstrates that a significant burden would be created by the overlapping, the pole owner may deny the attachment for reasons of safety, reliability or generally applicable engineering practice.

Third Party Overlapping.

The utility must permit existing attachments to be overlapped by third parties, subject to safety and engineering considerations. The FCC considers the original, or "host" attachment, as well as any overlapping done by the original attacher and any overlapping by a third party that may be permitted by the host attacher together to constitute only one attachment for which only one rental payment is due to the utility. The FCC expects the host attacher and the third party attacher to work out an arrangement to share the cost of the rental due to the utility. If the third party overlapping is used to provide a telecommunications service on an attachment that previously only provided cable service, the rate that will apply will be the telecommunications rate. The third party overlapper is not, however, counted as an additional attaching party for purposes of allocating the costs of unusable and usable space. The utility is not entitled to prior notice of overlapping either from the host or the third party attacher.

No Charges for Leasing Excess Capacity.

If an existing attacher leases excess capacity on its cable or dark fiber in its fiber bundle to a third party, the utility cannot charge for the use of the excess capacity or dark fiber by the third party. This use places no additional spatial or physical requirements on the pole. The FCC has ruled that the leasing of dark fiber or excess capacity is not an

individual pole attachment, separate from the host attachment. Therefore no payment is due to the pole owner, separate from the payment by the host attaching entity. Exception: if the host attaching entity used its cable to provide solely cable TV service and the leasing party uses the excess capacity to provide telecommunications services, the pole attachment rate formula would shift from the usable-space-only formula to the usable-plus-unusable-space formula.

No Non-Contest Clause.

A pole attachment agreement cannot contain a clause where the attaching party agrees not to contest any provision of the agreement. Such a paragraph would be *per se* unreasonable and a request to include such a paragraph in an agreement would be an act of bad faith in negotiation. In *Southern Company Services, Inc.*, the D.C. Circuit rejected utilities' challenges to the FCC's practice of allowing attachers to sign an agreement and then immediately file a complaint with the FCC challenging the reasonableness of its provisions.

Tagging.

A pole attachment agreement may require attaching parties to tag their attachments in order to facilitate easy identification of their lines.

Unauthorized Attachments.

A pole attachment agreement can include a paragraph which imposes a charge for unauthorized attachments that may be discovered. The Commission has recognized the utility's genuine interest in preventing such attachments and the use of monetary penalties as a deterrent. The Court of Appeals for the D.C. Circuit has upheld the right of a utility to discourage unauthorized attachments by imposing a monetary penalty. The court also upheld the FCC's ruling that the maximum monetary penalty is 5 times the annual rental plus interest. This penalty applies regardless of how long the attachment has been on the pole, even if only for two weeks. The utility need not prove how long the attachment has been in place. *Public Service Company of Colorado v. Mile Hi Cable Partners, L.P., et al.*, ___F.3d___, (DC Cir. 2003).

Pole Audits.

A utility can pass through the cost of counting the number of poles to which the attaching company has attached its facilities. The utility need not assure that it is charging the lowest possible fee, but the method it uses must be at reasonably

competitive rates. Furthermore, any additional benefit that the utility derives from the count or survey must not be billed to the attacher. The court of appeals in *Mile Hi Cable*, above, upheld the right of a utility to recover the cost of a pole attachment audit survey from the attaching entities and encouraged utilities not to delay such audits.

Payment for Pole Replacement.

If the utility must modify or replace a pole, duct or conduit to accommodate a new attachment request, the attacher who benefits from the modification has to pay for the modification. However, if other parties expand their use of the facilities at the same time, they would also share in the cost. Note, the FCC has ruled that even if the utility benefits from the increased pole capacity without paying for it, the utility does not have to compensate the parties who paid for the expansion. However, the modifying party or parties can recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification.

Reserve Capacity.

The utility can reserve capacity on its facilities for future expansion, but only if such reservation is consistent with a *bona fide* development plan that reasonably and specifically projects a need for that space **in the provision of its core utility service**. However, attachments must be allowed in the reserved space until the utility actually need the space. At that time the utility may recover the reserved space by giving notice to whoever was using it that they must now pay for the cost of any modifications needed to expand capacity in order to maintain their attachment. The utility may not reserve or recover capacity if it is a telecommunications utility such as a LEC or in order to provide telecommunications or video programming service.

The utility is entitled to reserve capacity for the provision of emergency service. In the ***Reconsideration Order***, the FCC clarified that space that is reserved for emergency purposes is distinct from other reserved space and is not subject to interim use by attachers.

In the same ***Reconsideration Order***, the FCC ruled that a utility could reserve space in anticipation of its near-term requirement to install cables for its own, internal communications needs in support of its core utility service.

Property Not “Owned or Controlled.”

Although a utility must allow qualified attachers on its poles and in its conduits, the authority of the attacher to traverse the land itself, that is, the right-of-way, is a separate issue. Ordinarily, the attacher must obtain its own easement or other authority from the landowner to traverse or occupy the property. A utility need not grant access to rights-of-way that it does not “own or control.”⁴ The scope of the utility’s ownership or control of land by virtue of an easement is a matter of state law. Note, however, that if an easement for power lines permits “compatible uses,” several court decisions have required the utility to allow access by cable operators.

Condemnation.

In reconsidering the *Local Competition Order*, the FCC reversed itself and held that a utility is **not** required, as a matter of federal regulation, to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access by third parties.

Qualified Workers.

A utility cannot require the work on poles or conduits under an attachment agreement to be performed only by its own employees or contractors. It can, however, specify the training criteria of those who will perform the work.

Transmission Towers.

Although the FCC had ruled in its *Order on Reconsideration* in CC Docket 96-98 that utilities had to allow access to transmission facilities as well as distribution poles, the Eleventh Circuit Court of Appeals in *Southern Company et al., v. FCC*, reversed the FCC and held that the *Pole Attachments Act* and the FCC’s regulatory power does not extend to a utility’s interstate electric transmission towers and facilities. The utility may, however, voluntarily permit access to its transmission towers and negotiate a rental rate that is not governed by the FCC’s pole attachment formula.

In *Omnipoint Corporation v. PECO Energy Company*, DA 03-857, released March 25, 2003, the FCC acknowledged that transmission facilities are not covered by the Pole Attachments Act, “but only to the extent that the transmission facilities are interstate and not part of a local distribution system.”

⁴ See, *UCA, L.L.C., d/b/a Adelphia Cable Communications v. Lansdowne Community Development, LLC et al.*, 215 F. Supp. 2d 742 (E.D. Va. 2002).

Access for Wireless Facilities.

A utility must allow the placement on its distribution poles of wireless facilities, such as antennas, by telecommunications providers. The U.S. Supreme Court so held in *Gulf Power II* and the FCC acted accordingly in the *Omnipoint* case, above. In the *Omnipoint* case, the FCC ruled that the utility must give the attacher the historical cost data relating to the poles to which wireless facilities would be attached, so that the attacher could determine if the rental rate is just and reasonable. The FCC acknowledged that “the pole attachment formula presumptions may be modified or adjusted in order to address unique attachments associated with wireless systems.”

Access to Roofs.

A utility does not have to grant access to all of its property, such as the roof of its corporate offices, if a telecommunications service provider wants to put up an antenna tower. The statute does not grant access to every piece of equipment or real property owned or controlled by the utility. However, in the First Report and Order and Further Notice of Proposed Rule Making in WT Docket 99-217 (FCC 00-366, released October 25, 2000) the FCC ordered utilities to allow access by cable TV companies and telecommunications providers to riser conduits in customer buildings or rights-of-way on a customer’s campus that the utility owns or controls.

Notice Requirements.

Existing attaching parties have a right to adequate notice when a pole or other facility must be modified. Unless the agreements with the attaching parties provide otherwise, the utility must generally give at least 60 days notice prior to making the planned modifications. Emergency modifications may be performed immediately, even in advance of any notice. Attachment rate increases are also subject to the 60-day notice requirement.

In general, the cost of the modification is to be borne by the party or parties who benefit from the modification, in proportion to their benefit. This includes the costs to maintain these modifications on an ongoing basis. If, however, the owner of the pole derives a benefit, such as curing an NESC violation, the owner will be deemed to share in the benefit and will be required to bear a proportionate share of the cost.

Attaching parties cannot remain silent while others bear the direct costs of modification and then seek attachments at normal attachment rates. The initiators of modifications can recover a percentage of their costs from later attachers. To do so,

however, the modifying parties must maintain the necessary accounting records to support their claim for reimbursement from later attaching parties. It is not the responsibility of the utility to maintain these records.

If the owner of the pole does not initiate the modification nor benefit from it, but nevertheless acquires additional capacity from which attachment revenues may be derived, there is no obligation to use such revenues to compensate those attachers who paid for the modification.

Pole Movement Required by Local Government.

When the utility is forced by the local government to move its poles to accommodate road widening, the reasonably projected incremental costs associated with movement of attaching entities' facilities must be factored into the standard rent that the attaching parties pay, and not treated as a separate cost to be recovered.

Dispute Resolution.

The FCC has *primary jurisdiction* to decide whether the rates, terms and conditions found in the contract are just and reasonable. See, *Mile Hi Cable Partners et al. v. Public Service Company of Colorado*, 14 FCC Rcd 3244, 15 CR 108, 1999 FCC LEXIS 714 (February 22, 1999), which holds that the FCC has jurisdiction to hear a complaint regarding the penalty for unauthorized attachments to poles. This decision has been appealed, however. See footnote 5.

Contract Termination.

Although a pole attachment agreement may contain a provision to govern termination of the agreement upon notice by either party, a utility's ability to terminate the agreement in order to assess a higher rental rate seems to be limited. In *Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, DA 00-2078, released September 8, 2000, the utility gave notice of termination to attached cable companies, but offered to enter into a new pole attachment agreement at a substantially higher rate, which the utility felt represented just compensation under the Constitution. The Cable Services Bureau ruled the new rate unreasonable and ordered the utility to permit the cable companies to remain attached on the poles at the current rate while a new agreement was negotiated.

Nevertheless, the FCC has stated that voluntary agreements that were entered into before access to poles became mandatory under the *Telecommunications Act of 1996* do

not automatically become mandatory agreements and “at some point, a pole owner reasonably may terminate a voluntary relationship with an attacher without running afoul of section 224, even though the pole owner still must grant access.” *Florida Cable Telecommunications Association, Inc. et al., v. Gulf Power Company*, DA 03-1555, released May 13, 2003.

Administrative Remedies.

If the FCC finds that the rates, terms or conditions of a pole attachment agreement are not just and reasonable, the FCC can order several remedies, including:

- (a) Termination of the unjust and unreasonable rate, term, or condition in the contract.
- (b) Substitution in the pole attachment agreement of a just and reasonable rate, term, or condition established by the Commission. Or
- (c) Order of a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.
- (d) In addition to ordering the reformation of pole attachment agreements and refunds of payments that were unreasonable, the FCC also has the authority, under § 1.1403(d) of its rules, to order a stay of certain actions by the utility. To obtain a stay, however, the complainant must show that it has suffered or will suffer irreparable harm as a result of the action sought to be stayed. In *Fiber Technologies Networks, L.L.C., v. Duquesne Light Company*, DA 03-1774, released May 27, 2003, the complainant sought to stay the collection of approximately \$500,000 in make-ready charges which it contended in its related complaint were unreasonable. The FCC denied the stay, stating that the complainant had failed to explain how it would be irreparably harmed if it simply paid the money with the expectation that it would later recover the payment as a refund if it ultimately prevailed in its complaint.

Note, there is no provision in the FCC regulations authorizing the FCC to award actual or punitive damages. However, in the *Marcus Cable Associates* case cited above, the FCC’s Cable Bureau implied that it might have such authority.

The FCC does not have authority to award costs and attorneys' fees. *Texas Cable and Telecommunications Association v GTE Southwest Incorporated* (DA 99-348, released February 18, 1999).

Time for the FCC to Rule on a Complaint.

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

The complaint in the case of *Texas Cable & Telecommunications Association et al. v. Entergy Services, Inc.*, DA 99-1118, discussed above, was filed on July 9, 1997 and the decision was released June 9, 1999.

A complaint by the Cable Television Association of Georgia relating to an October, 1997, pole attachment rental rate increase by Bellsouth Telecommunications, Inc., was decided by the Enforcement Bureau on July 19, 2002. (DA 02-1733).

The complaint in the *Omnipoint v. PECO Energy Company* case was filed on April 1, 1997 and resolved by the FCC on March 25, 2003.

The complaint in the *Florida Cable Telecommunications Association v. Gulf Power Company* case was filed July 10, 2000 and resolved by the FCC on May 13, 2003.

Notes