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

In the Matter of	)	
	)	
Cavalier Telephone, LLC	)	
	)	File No. PA 99-005
v.	)	
	)	
Virginia Electric and Power Company	)	
	)	
	)	

ORDER AND REQUEST FOR INFORMATION

Adopted: June 6, 2000 **Released: June 7, 2000**

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order we consider a pole attachment complaint ("Complaint"), filed with the Federal Communications Commission ("Commission") on November 30, 1999, by Cavalier Telephone, LLC ("Complainant") against Virginia Electric and Power Company ("Respondent"), pursuant to Section 224 of the Communications Act ("Pole Attachment Act")[1] and Part 1, Subpart J, of the Commission's rules.[2] On December 28, 1999, we granted Respondent an extension until January 6, 2000, to file is response.[3] Respondent filed its opposition ("Response") on January 6, 2000 which included a motion to dismiss ("Motion I"). Complainant filed a timely reply on January 27, 2000 ("Reply"). Pursuant to the Commission's rules,[4] further information was requested by the Commission via letter[5] and both Complainant and Respondent replied.[6] Our rules require that the parties seek first to resolve their differences by negotiation.[7] Based on our review of the record, we accept Complainant's assertion that further negotiations between the two parties are likely to be fruitless.[8] In this Order, we grant the

[1] Communications Act of 1934, *as amended*, 47 U.S.C. § 224.

[2] 47 C.F.R. §§ 1.1401-1.1418.

[3] *See* Cavalier Telephone, LLC v. Virginia Electric and Power Company, 15 FCC Rcd 40 (2000).

[4] 47 C.F.R. § 1.1409 (a).

[5] *See* letters dated March 13, 2000 to both parties from Kathleen F. Costello, Acting Division Chief, Financial Analysis and Compliance Division, Cable Services Bureau

[6] *See* letter dated March 16, 2000 from Raymond A. Kowalski, counsel for Respondent, and letter date March 14, 2000, from J. D. Thomas, counsel for Complainant.

[7] 47 C.F.R. § 1.1404 (l).

[8] Complaint at ¶ 207.

Complaint in part and reserve our determination of certain issues pending our review of additional information to be provided by Respondent, which we request herein.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments 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. The Commission shall provide that such rates, terms and conditions are just and reasonable.[9] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[10] The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[11] A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the formula developed by the Commission. We have concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[12]

3. The Pole Attachment Act, as amended by the Telecommunications Act of 1996 ("1996 Act"),[13] also imposes upon all utilities, the duty to "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."[14] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[15] In the Local Competition Order,[16] the Commission outlined rules of general applicability to be applied in evaluating a request for access pursuant to the Pole Attachment Act.[17] Specifically, 1) a utility may rely on industry codes, such as the National Electrical Safety Code ("NESC"), to prescribe standards with respect to capacity, safety, reliability and general engineering principles; 2) a utility will still be subject to any federal requirements, such as those imposed by FERC or OSHA, which might affect pole attachments; 3) state and local requirements will be given deference if not in direct conflict with Commission rules; 4) rates, terms

[9] 47 U.S.C. §224 (b) (1).

[10] 47 U.S.C. § 224(b)(1) and (2). Virginia has not certified that it regulates rates, terms and conditions of pole attachments.

[11] 47 U.S.C. § 224(b)(1). The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate. *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd*, Monongahela Power Co. v. FCC, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). *See also*, Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) and Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116 (released April 3, 2000).

[12] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

[13] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[14] 47 U.S.C. § 224 (f) (1).

[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1123 (1996).

[16] *Id.*

[17] *Id.* at ¶ 1151, *et seq.*

and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and 5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services.[18]

4. In the Local Competition Order, the Commission also enumerated guidelines concerning the reasonableness of certain terms and conditions of access.[19] These guidelines were later modified and refined in the Local Competition Reconsideration Order.[20] Some of the pertinent provisions include: 1) a utility must explore potential accommodations in good faith with the party seeking access before denying access based on a lack of capacity[21] and must expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs;[22] 2) the assessment of issues of capacity, safety, reliability and engineering must be done in a nondiscriminatory manner;[23] 3) attaching parties may use any workers who have the same qualifications, in terms of training, as the utility's own workers;[24] 4) utilities must allow access, subject to conditions necessary for reasons of safety and reliability, to transmission facilities;[25] 5) absent an emergency or private agreement, a pole owner must provide written notification to attachers, 60 days before the modifications commence;[26] 6) a utility or other party that uses a modification as an opportunity to correct safety violations will be responsible for its share of the modification costs;[27] and, 7) a utility must notify an attacher within 45 days of its written request for access that the access is either granted or denied.[28]

II. PRELIMINARY MOTIONS

5. Respondent filed three motions for leave to file additional motions, one for dismissal so that the parties might proceed to arbitration ("Motion II") (filed January 6, 2000), one for an evidentiary hearing ("Motion III") (filed January 6, 2000), and another for dismissal based on a recent court decision ("Motion IV") (filed May 1, 2000). Complainant filed timely oppositions/responses to the motions and Respondent filed replies. We grant the motions for leave to file and deny all four of Respondent's substantive motions for the following reasons. In Motion I, Respondent argues that Complainant should not be allowed to request an expedited review process pursuant to the Commission's rules.[29] Because we have allowed Respondent to file a full and complete Response in accordance with our regular complaint

[18] *Id.* at ¶¶ 1151-1158.

[19] *Id.* at ¶ 1159, et seq.

[20] In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, FCC 99-266 (released October 26, 1999).

[21] Local Competition Order at ¶ 1163.

[22] Local Competition Reconsideration Order at ¶ 51.

[23] Local Competition Order at ¶ 1176.

[24] *Id.* at ¶ 1182.

[25] *Id.* at ¶ 1184.

[26] *Id.* at ¶1209.

[27] Local Competition Reconsideration Order at ¶ 16.

[28] *Id.* at ¶ 117.

[29] 47 C.F.R. § 1.1404 (n) (1999). *See also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, 11 FCC Rcd 15499 (1996).

procedures,[30] we find Respondent's Motion I to be moot and it is therefore denied. In its Motion II, Respondent argues that Complainant's agreement to arbitrate contract disputes in effect waives Complainant's right to file a complaint pursuant to 47 U.S.C. § 224. We disagree. In a letter ruling dated January 17, 1997, we made clear that any attempt to require an attacher to waive its rights and remedies under § 224 would be a per se violation of § 224. Although certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments.[31] An arbitration clause cannot be applied to prevent a party from seeking redress with the Commission. Therefore, we deny Respondent's Motion II.

6. We also deny Respondent's Motion III requesting an evidentiary hearing. The pole attachment complaint procedures are intended to ensure a simple and expeditious process for resolving complaints.[32] The Commission may resolve the complaint based upon the filings, it may require meetings with the parties to clarify issues, and it may, at its discretion, order evidentiary proceedings.[33] The decision of whether to hold a hearing on any issue related to a complaint is solely within the discretion of the Commission.[34] In this matter, both parties have submitted extensive pleadings, affidavits and exhibits to explain their respective positions. We conclude that we have before us sufficient information upon which to make a decision in this matter. We will request further information where necessary. Accordingly, we will not hold a hearing in this proceeding and will deny Respondent's Motion III.

7. Finally, Respondent filed its Motion IV, requesting dismissal of the Complaint for lack of jurisdiction, based on the recent decision in Gulf Power, et al. v. FCC[35] ("Gulf Power II"). Gulf Power II disposed of consolidated petitions for review of the Commission's Order[36] implementing 47 USC § 224, as amended by the 1996 Act. Further litigation in this matter is in progress and as a consequence, the mandate in the Gulf Power II proceeding has not been issued by the Court. Pending the issuance of a mandate from the Court, or a clarification of the Gulf Power II decision, we will continue to apply our pole attachment rules to all attachers who are either cable service or telecommunications service providers. Therefore, we will deny Motion IV.

III. BACKGROUND

8. Complainant is an independent, facilities based competitive local exchange carrier ("CLEC") that is building a 150 mile fiber optic network in the Richmond, Tidewater and northern Virginia areas.[37] Complainant plans to offer local telephone service, high-speed Internet access and Internet caller

[30] 47 C.F.R. § 1.1407.

[31] *See, for example*, In the Matter of Mile Hi Cable Partners, et al. v. Public Aervice Company of Colorado, 14 FCC Rcd 3244 (1999) at ¶ 12.

[32] *See* Adoption of the Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C. 2d 1585 at ¶ 36 (1978).

[33] 47 C.F.R. § 1.1411.

[34] *Id.*

[35] Gulf Power, et al. v. FCC and USA, 208 F. 3d 1263 (11th Cir., released April 11, 2000).

[36] Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, FCC 98-20, 13 FCC Rcd 6777 (1998).

[37] Complaint at ¶ 23.

identification[38] in these areas. Respondent is a regulated utility engaged in the provision of electric services in the Commonwealth of Virginia. Respondent also provides telecommunications services, having formed a telecommunications subsidiary, VPS Communications, Inc. ("VPSC") in 1997. VPSC received certification as a CLEC in August 1999. Respondent describes VPSC as a "carrier's carrier," that provides long-haul capacity to local exchange carriers ("LECs") and interexchange carriers ("IXCs"), but does not serve as a significant provider of service to end users.[39] Complainant believes that the existence of VPSC qualifies Respondent as a "telecommunications-diversifying electric utility" that has built a 600 mile fiber network in Virginia to serve communities from Norfolk to Richmond to Arlington and Fairfax Counties.[40] Respondent's involvement in telecommunications leads Complainant to assert that it is in a competitive relationship with the utility in the quest for customers and access to support structures. Complainant believes that this competitive relationship accounts for Respondent's discriminatory treatment of Complainant.

9. Complainant alleges that it has been effectively denied access to poles owned by Respondent. The complaint seeks immediate relief from alleged illegal and discriminatory terms and conditions of pole attachments imposed by Respondent. Complainant seeks an order compelling Respondent to (a) grant Complainant access to all support structures and right-of-ways; (b) cease unreasonable and discriminatory access terms, conditions and practices contained in the pole attachment agreement between the parties or otherwise imposed; (c) terminate the unlawful pole attachment rate and set a rate not to exceed the lawful amount calculated under 47 U.S.C. § 224(d); (d) refund to Complainant excessive rental and other administrative, engineering and make-ready fees[41] charged to date.[42] Complainant also asks that the Commission impose forfeitures for Respondent's ongoing violations of the Pole Attachment Act, past Commission Orders and the Commission's access rules.

10. Respondent answers that, prior to Complainant's requests for attachment, its utility poles were already crowded with electric and telephone lines, cable television lines and the lines of telecommunications carriers. Respondent argues that, given the extent of the prior joint use of these poles, no new attacher could reasonably expect to simply add its line to the poles without a substantial amount of effort in order to maintain adherence with applicable codes of safety and good engineering practice. Respondent claims that it has no motive to disadvantage Complainant and that every practice and policy it employs is absolutely necessary for the safe and reliable delivery of electric power to its customers. Respondent claims that its pole attachment agreements with Complainant follow industry standards and that it has negotiated and signed approximately 400 pole attachment agreements with numerous entities, including Complainant. Respondent alleges that certain routes that follow natural corridors are desired by

[38] Internet caller identification allows a customer to see who is calling and decide how to handle a call, without ending an Internet session.

[39] Response at ¶ 33.

[40] Complaint at ¶ 32.

[41] Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole "change-out" is the replacement of a pole to accommodate additional users.

[42] Complaint at ¶ 13. Complainant set forth a more detailed request for relief at the end of its Complaint. Complaint at ¶¶ 209-211.

several parties wishing to attach and that most poles do not have vacant space that could simply be made available to Complainant with just a minimum of make-ready work.[43]

IV. TERMS OF THE AGREEMENT

11. Complainant alleges that, pursuant to its pole attachment agreements with Respondent, its rights are completely subordinate to any other attaching party. Specifically, Complainant alleges that Section 2 of the agreements, which provides that Complainant's applications for attachments "shall be subject to the attachment rights of other parties under joint use" is in violation of the anti-discrimination proscriptions of Section 224(f)(1), and the Commission's access principles as enumerated in the Local Competition Order and Local Competition Reconsideration Order.[44] Respondent responds that Section 2 of the pole attachment agreements simply alerts Complainant that Respondent has joint use agreements with other utilities.[45] Electric and telephone utilities frequently enter into joint use agreements to assign or transfer the right to contract pole space out to prospective attachers. Pursuant to a joint use agreement, a telephone company may have acquired the authority to enter into a pole agreement with other telephone companies seeking to attach to poles the telephone company does not own. Section 2 of the pole attachment agreements states that Respondent has entered into joint use agreements with other parties for the use of its poles and that the attachment rights of Complainant will be subject to the rights of these parties. We believe that the plain language of Section 2 does not translate into Complainant's attachment rights being "subordinate" to the rights of all other parties attaching to Respondent's poles. We find Respondent's explanation that Section 2 alerts Complainant to the existence of joint use agreements and obtains Complainant's acknowledgement of these relationships and the different rights that belong to the pole owners, as opposed to the licensees, to be reasonable. However, we note that this term of the agreements cannot be applied by Respondent in a manner that will discriminate in favor of the joint users or pole owner with respect to the provision of telecommunications or video services.[46]

12. Complainant argues that Section 4a of the agreements[47] makes Complainant responsible for all pole modifications necessitated by any pre-existing or subsequently attaching party.[48] Respondent claims that Section 4a merely requires Complainant to pay its own costs to install, maintain and repair its attachments in a manner that doesn't conflict with the rights of the pole owners, and that this is a completely reasonable requirement.[49] We agree that, on its face, this term merely acknowledges that

[43] Response at ¶ 19, *et seq*.

[44] Section 2 states that "It is understood by Customer that Virginia Power has heretofore entered into, and may in the future enter into, contractual agreements with other parties for the joint use of its poles. Therefore, an application submitted by Customer under the terms of this Agreement and any license granted by Virginia Power shall be subject to the attachment rights of other parties under joint-use agreements, or otherwise." Complaint, Exhibit 1.

[45] Response at ¶ 90.

[46] Local Competition Order at ¶¶ 1151-1158.

[47] Section 4a provides that Complainant "shall, at its own expense, make and maintain said attachments in safe condition and good repair, and in a manner suitable to Virginia power and so they will not conflict with the use of said poles by Virginia Power, or by other parties using or having reserved the right to use said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon." Complaint, Exhibit 1.

[48] Complaint at ¶42.

[49] Response at ¶91.

Complainant is required to pay for its own attachments and not interfere with other attachers. This is reasonable as long as Complainant is not required to pay in excess of the maximum pole attachment rate under our formula or reimburse Respondent in excess of the actual costs of make-ready or pole change-out work necessitated by Complainant's attachment. The term cannot be applied to allow Respondent to subordinate Complainant's attachments to other attachers, nor can it be read to subordinate other attachers to Complainant's attachments. It also may not be applied to require Complainant to pay the costs incurred by other attachers.

13. Complainant also argues that Section 7 of the pole attachment agreement makes it responsible for the full cost of maintenance and of all pole modifications necessitated by pre-existing or subsequently attaching parties to Respondent's poles.[50] Respondent points out that Section 7 does not represent a mandate that Complainant pay for maintenance for all the parties attached to any given pole, but rather that it pay for any costs generated by its own attachment to the pole.[51] Respondent argues that the section appears in pole attachment agreements with other attachers and operates to protect Complainant from their costs. The term on its face does not appear unreasonable but it cannot be applied by Respondent to require Complainant to pay for the costs of other attachers' safety violations or other attachers' rearrangements which are not necessitated by Complainant's attachment. Also, it may not be interpreted to require Complainant to pay for its make-ready work twice. To the extent Complainant is required to pay the cost of make-ready work to attach to a pole, that cost cannot be included in the pole rental fee. Normal pole maintenance costs will be included in the pole rental fee and Complainant cannot be required to pay twice for the same costs.[52]

14. Finally, Complainant argues that Section 3 of the pole attachment agreements gives Respondent the discretion to deny access based on the "character" of the attachments.[53] Complainant argues that this provision violates the Pole Attachment Act.[54] Respondent charges that Complainant has

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[50] Complaint at ¶ 42. Section 7 states that "Customer shall, on demand, pay to Virginia Power, or other party as the case may be, the full cost of maintenance, replacement, rearrangement, extension, enlargment or operation of the facilities belonging to Virginia Power or any other party having pole attachment rights when such costs are incurred because of the existence of Customer's facilities and would not have been incurred in the absence of Customer's attachment to Virginia Power's poles." Complaint, Exhibit 1.

[51] Response at ¶ 93.

[52] We have stated on numerous occasions that the attaching entity should not be charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account. Amendment of Rules and Policies Governing Pole Attachments at ¶ 7, FCC 00-116 (released April 3, 2000).

[53] Section 3 states that "Customer's cables, wires, and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the latest National Electrical Safety Code, the National Electrical Code, and other applicable practices and specifications of Virginia Power and any amendments or revisions of said Codes, Practices, or Specifications and in compliance with any rules or orders now in effect or that hereafter may be issued by the State Corporation Commission of Virginia or any authority having jurisdiction. *It is expressly understood, however, that Virginai power reserves the right to refuse to permit or to limit the number and character of attachments on any poles or poles.*" (emphasis added). Complaint, Exhibit 1.

[54] Complaint at ¶ 47. 47 U.S.C. § 224 (f) (2) states that "a utility providing electric service 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 and for reasons of safety, reliability and generally applicable engineering purposes."

failed to provide a single example of where an attachment has been denied due to its character.[55] Respondent concludes that until Complainant is subjected to an actual or threatened denial, any claim that the contract provision is unreasonable is purely speculative.[56] We disagree. The second sentence of Section 3 attempts to acknowledge that Respondent may deny access based on reasons that are not related to capacity or safety and is unreasonable on its face. Respondent may only deny access for the reasons stated in the Pole Attachment Act.

V. DELAYS IN THE PERMIT PROCESS

15. Complainant alleges that it has suffered numerous delays in obtaining Respondent's approval to attach to its poles and that these permitting delays have slowed the building of Complainant's network and driven up costs. Respondent answers that under the Commission's rules, it is required to respond to Complainant's permit requests within 45 days only if it is going to deny the application.[57] Our rules require Respondent to grant or deny access within 45 days of receiving a complete application for a permit.[58] We have previously stated that the Pole Attachment Act seeks to ensure that no party can use its control of facilities to impede the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields.[59] We have interpreted the Commission's rules, 47 C.F.R. § 1.1403 (b), to mean that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted."[60] We conclude that Respondent is required to act on each permit application submitted by Complainant within 45 days of receiving the request. To the extent that a permit application includes a large number of poles, Respondent is required to approve access as the poles are approved, so that Complainant is not required to wait until all the poles included in a particular permit are approved prior to being granted any access at all. Respondent shall immediately grant access to all poles to which attachment can be made permanently or temporarily, without causing a safety hazard, for which permit applications have been filed with Respondent for longer than 45 days.[61]

16. Complainant maintains that Respondent has imposed the costs of all make-ready work associated with its poles on Complainant, even though the work may have been required only to correct another attaching entity's pre-existing safety violations. Complainant believes that Respondent should be required to allocate the costs of correcting pre-existing safety violations among the attaching entities that are responsible for these costs. Respondent argues that it is entitled to deny Complainant access because of pre-existing safety violations that must be corrected before Complainant can attach. Respondent suggests that Complainant can expedite the permitting process by paying for and correcting these pre-existing safety violations or waiting for up to 5 years for Respondent to correct them.[62] Respondent suggests that

[55] Response at ¶¶ 99.

[56] *Id.*

[57] Response at ¶ 26.

[58] 47 C.F.R. § 1.1403 (b)

[59] Local Competition Order at ¶ 1123.

[60] In the Matter of Application of Bellsouth Corporation, FCC 98-271, 13 FCC Rcd 20599 (1998).

[61] We have previously ordered utilities to grant applications for permits which have been pending for an excessive length of time. *See, for example*, In the Matter of Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Company, DA 99-1376, 14 FCC Rcd 11599 (1999).

[62] Response at ¶ 72. Respondent acknowledges that Complainant may have legitimate concerns about shouldering the burden of safety violations, but concludes that Complainant can avoid this expense by waiting for the violations (continued…)

Complainant has the option to expedite the make-ready process by contacting and working with attachers with outstanding violations.[63] Respondent argues that it is not required to ensure that other attachers pay their share of correcting safety violations.[64] We find this to be unacceptable. While we find Respondent's interest in correcting safety violations to be laudable, Complainant is only responsible for make-ready costs generated by its own attachments. Respondent is prohibited from holding Complainant responsible for costs arising from the correction of safety violations of attachers other than Complainant. Respondent must reimburse Complainant for any payments made to Respondent to correct other attachers safety violations. It is up to Respondent to require other attachers to reimburse Respondent or otherwise pay for corrections of safety violations.

17. Respondent also believes that it is not responsible for managing attachments to the pole or notifying attachers when safety violations must be corrected or when make-ready or other work which may affect the attachments is going to be performed.[65] Respondent is required by the Pole Attachment Act to notify other attachers of any pending work which will affect their attachments.[66] Respondent cannot abrogate its duties as pole owner or force Complainant to accept Respondent's duties towards other attachers in order to delay the process of attachment. Due to the inherent disparity in the relationship of the Complainant and the Respondent to the other parties that have attached to a pole, we find that Respondent is responsible for coordinating and notifying the attaching parties. Any costs incurred by Respondent in managing and maintaining its poles is passed through to Complainant and other attachers in the form of make-ready costs or the pole rental fee.

18. The Complainant also alleges that Respondent has refused to allow it to use third party contractors for make-ready work, even when the contractors were similarly trained and qualified as those employed by the Respondent.[67] The Respondent argues that while the Commission has required it to allow qualified workers to work in proximity to electric lines, it is not required to allow its own electric facilities to be handled by non-employees or contractors.[68] According to the Respondent, it does not allow multi-party[69] engineers and contractors under the control of another company to work on its facilities.[70] We have

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to be remedied in the normal course of Respondent's surveys for identification and correction of violations. Respondent reports that it has established a five year plan to survey and correct existing violations.

[63] *Id* at ¶ 73.

[64] *Id*. at ¶ 74

[65] The Complainant asserts that the Respondent must undertake the responsibility to coordinate the rearrangement of existing parties on the pole to facilitate the Complainant's new attachments. Complaint at ¶ 100. The Complainant asserts that it cannot be expected to compel these entities, with whom it has no official relationship and some of whom are its competitors, to rearrange for a pole for the Complainant's benefit. *Id.* at ¶ 102. Respondent argues that it is the Complainant's responsibility to perform the coordination management function. Response at ¶ 69.

[66] 47 U.S.C. § 224 (h).

[67] Complaint at ¶ 106, *et seq.*

[68] Response at ¶ 114.

[69] According to the Complainant, it is a common practice for a new attacher to seek to have all make-ready work coordinated through a single contractor who is qualified to work on both electrical and communications facilities. This is called a multi-party contractor. A multi-party contractor can save costs and avoid delays that would be incurred when independent crews each do piecemeal work consecutively. Complaint, Declaration of Bill Williams at ¶ 44, *et seq.*

stated that a "utility may require that individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria."[71] While we agree that the use of multi-party contractors is an efficient means to accomplish make-ready work, and we encourage Respondent to consider that alternative, we are not ready to order Respondent to proceed with that method. However, Respondent must make the effort to coordinate all make-ready work and specifically to perform any necessary work on its own facilities in a timely and cooperative manner. Respondent cannot use its control of its own facilities to impede Complainant's deployment of telecommunications facilities.

19. Finally, Complainant argues that Respondent has discriminated against Complainant because it allows its own use or other attachers' use of extension arms,[72] boxing[73] and taller replacement poles and refused to allow Complainant to use these same methods. There are also numerous allegations of other delaying tactics such as changing guying[74] instructions, unnecessary stop work orders and not allowing temporary attachments. Respondent cannot discriminate against Complainant in favor of other attachers or itself. That premise is at the heart of the 1996 Act. Respondent has already agreed to allow temporary attachments.[75] Respondent uses extension arms and boxing for its own attachments[76] and must allow other attachers to do the same.[77] Perhaps Respondent's allowance of extension arms and boxing will preclude the need for taller poles. However, we have stated that a utility must "take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs;"[78] and "explore potential accommodations in good faith with the party seeking access."[79] Respondent already has some poles that are taller than 55 feet. Respondent argues that it only has a few bucket trucks capable of reaching the taller poles and that these trucks may not be available after separation of the transmission and distribution functions through deregulation of the electric industry.[80] Complainant states that it is not interested in a significant conversion to taller poles but only an occasional taller pole to accommodate its attachment. Respondent must negotiate in good faith with the Complainant to replace poles where it is necessary to accommodate Complainant's attachment. Respondent already has bucket trucks capable of maintaining the taller poles and will always need a number of these trucks to

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[70] *Id.* at ¶ 115.

[71] Local Competition Reconsideration Order at ¶ 86.

[72] Extension arms extend from the pole to support communications lines at the same level as existing lines which are attached to the pole. Response at ¶ 47, n. 13.

[73] Boxing refers to the installation of communications lines on both sides of the same pole at approximately the same height. Response at ¶ 52, n. 15.

[74] A guy wire is a cable or wire used for steadying the pole. Guying refers to the use of guy wires, extending from the pole to the ground, to support the pole, i.e., to offset the stress the pole must endure from the attached wires.

[75] Response at ¶ 46.

[76] Response at ¶ 49; ¶ 53.

[77] Respondent can limit the use of less desirable methods of attachment, such as boxing, by allowing alternative methods, such as extension arms, where appropriate.

[78] Local Competition Reconsideration Order at ¶ 51.

[79] Local Competition Order at ¶ 1163.

[80] Response at ¶¶ 50-51.

maintain its own taller poles. Complainant is responsible for the costs of the change-out. In addition, Respondent must cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards to which Complainant must adhere.

VI. ACCESS TO OTHER UTILITY FACILITIES

20. Complainant alleges that Respondent denied Complainant access to transmission support structures, ducts and conduits.[81] Respondent answers that it is not denying access and is pursuing negotiations for that access.[82] We stated that an electric utility may "impose conditions on access to transmission facilities, if necessary for reasons of safety and reliability."[83] However, Respondent is under an obligation to grant or deny access within the established period of time and to charge Complainant only for the actual costs incurred in ascertaining available capacity.[84] Respondent must provide Complainant with an explanation of any costs associated with ascertaining available capacity. Respondent must also supply Complainant with any relevant data pertaining to Complainant's request for access.[85] Respondent is charged with negotiating in good faith with Complainant to accommodate Complainant's requests for access.[86] Should the parties fail to reach an agreement on the terms of this access, Complainant may seek recourse with the Commission.

VII. RATES AND FEES

21. Complainant alleges that Respondent is charging an unreasonable annual pole attachment fee of $36.00 per pole in 1999, $37.00 in 2000 and a projected $38.00 in 2001. Respondent is charging cable companies approximately $5.00 per pole and other Virginia utilities are charging Complainant approximately $4.00 per pole.[87] The 1996 Act amended the Pole Attachment Act in several important respects. Section 703(6) of the 1996 Act added a new Subsection 224(d)(3),[88] that expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers[89] in addition to cable systems,[90] until a separate methodology[91] becomes effective for telecommunications carriers after February 8, 2001.[92] Our current formula applies to attachments made by cable systems and telecommunications carriers providing telecommunications services until February 8, 2001.[93] In order to calculate a reasonable pole attachment rate when the parties to a pole

[81] Complaint at ¶ 191.

[82] Response at ¶ 81, *et seq.*

[83] Local Competition Order at ¶ 1184.

[84] Local Competition Reconsideration Order at ¶ 107.

[85] *Id.* Local Competition Order at ¶ 1223.

[86] Local Competition Order at ¶ 1163.

[87] Complaint at ¶ 8.

[88] 47 U.S.C. § 224(d)(3).

[89] 47 U.S.C. § 153(44).

[90] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[91] *See* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

[92] *See* 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4).

[93] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116 at ¶ 5 (released April 3, 2000).

attachment agreement cannot negotiate a reasonable rate, we apply our formula using public data when available. Respondent provided information from its FERC Form 1 filings for 1998 and 1999 but did not include the pole count used to calculate rates. Therefore, we will request Respondent to file that additional information with the Cable Services Bureau and any other necessary information as required by Bureau staff. We will issue a separate order calculating a reasonable rate and any refund liability for overcharges.

22. Complainant also alleges that respondent is charging unlawful application and administrative fees.[94] Specifically, Complainant is charged an application fee of $50.00 per permit or $4.00 per pole, whichever is larger.[95] A just and reasonable pole attachment rate assures a utility recovery of not less than the incremental cost of providing pole attachments nor more than the fully allocated costs.[96] A rate that is comprised of both incremental and fully allocated components is not *per se* unreasonable or unjust nor does the Commission view the mandate set out in Section 224(d)(1) of the Act[97] as requiring a utility to charge rates that are based either on incremental cost or fully allocated costs.[98] Incremental costs may consist of both recurring and non-recurring costs.[99] Non-recurring incremental costs are out-of-pocket expenses attributable to pole attachments. They include pre-construction, survey, engineering, make-ready, and change-out costs. Non-recurring incremental costs are directly reimbursable to the utility and are excluded from the incremental rate.[100] We stated that a "separate charge or fee for items such as application processing or periodic inspections of the pole plant is not justified if the costs associated with these items are already included in the rate, based on fully allocated costs, which the utility charges the cable company since the statute does not permit utilities to recover in excess of fully allocated costs."[101] We look closely at make-ready and other charges to ensure that there is no double recovery for expenses for which the utility has been reimbursed through the annual fee.[102] The record contains no explanation of the fees contested by the Complainant other than that the fees are not otherwise recovered by Respondent.[103] The application fee appears to be an administrative fee for costs associated with the application process and does not appear to reflect actual costs. It may be a recurring cost recoverable through the annual fee and included in the carrying charges when calculating the maximum rate. If so, the application fee effectively increases the annual fee beyond the maximum permissible rate and, therefore, results in an annual fee that is unjust and unreasonable. Because Respondent provided no explanation that the administrative costs associated with permit application processing are not otherwise included in the carrying charges, we find that the fees are an unjust and unreasonable rate, term, or condition.

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[94] Complaint at ¶ 49.

[95] *Id.* at ¶ 50.

[96] Adoption of the Rules for the Regulation of Cable Television Pole Attachments, 72 FCC 2d 59 (1979).

[97] 47 U.S.C. §224(d)(1).

[98] Amendment of Rules and Policies Governing Pole Attachments, 68 FCC 2d 1585 at ¶ 42 (1978).

[99] Adoption of Rules for the Regulation of Cable Television Pole Attachments, Second Report and Order, 72 FCC 2d 59 at ¶¶ 28-30 (1979).

[100] *Id.* at ¶ 29.

[101] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 at ¶ 44 (1987).

[102] *Id. See also,* In the Matter of Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc. et al., File No. PA 97-005, DA 99-1118, 14 FCC Rcd 9138 (1999); *and* Teleprompter Corp. v. Houston Lighting and Power Co., 49 Rad. Reg. 2d 1301 (1981).

[103] Response at ¶ 95.

23. Complainant also alleges that Respondent charged excessive engineering costs and delayed the permitting process through shoddy and unnecessary engineering requirements.[104] Respondent replies that the additional engineering work was required because Complainant's original engineering firm was incompetent.[105] Complainant claims that it could not simply make a determination regarding the work that needed to be performed so that it could install its new attachments, but was required to measure and document all pole attachments of all parties, including Respondent's attachments.[106] Respondent claims that it never kept records of the elevations of its attachments and overhanging wires or of other companies' attachments.[107] Apparently neither Complainant's nor Respondent's engineers were perfect. However, we find it unusual that an attacher (possibly the third or fourth telecommunications attacher, in addition to the Respondent with electric and communications attachments, as well as telephone and cable attachers) was required to document all these attachments when apparently no other attacher was required to do so. Otherwise, Respondent would have had records of prior engineering work. Respondent cannot require Complainant to perform engineering work that other attachers are not required to perform. If Respondent has records of prior engineering work on poles that Complainant wishes to attach to, Respondent must produce those records for the benefit of Complainant. To the extent that Complainant paid Respondent for engineering work that was useless or otherwise defective, Respondent should reimburse Complainant. Complainant asks for half of the $168,500 that was charged by Respondent.[108] Respondent implies that it already made deductions for unproductive work performed by its engineers.[109] Respondent will provide Complainant with documentation of these deductions and will determine if a refund is due to Complainant for unproductive work.

24. In its pleading, Complainant registers two other objections to Respondent's rate-setting methodologies. The first concerns Respondent's treatment of make-ready charges that are reimbursed by Complainant. Respondent has recorded Complainant's make-ready reimbursements, and those of other attachers, as capital contributions in aid of construction ("CIAC"). To justify this methodology, Respondent offers the following excerpt from Internal Revenue Service Bulletin 1987-2 (July-December):

> New section 118(b) of the Internal Revenue Service code of 1986 (the "1986 Code") expressly provides that contributions in aid of construction and other contributions made by a customer or potential customer (collectively, "CIACs") are not contributions to capital and thus are not excluded from gross income under section 118. Accordingly, such amounts are required to be included in gross income under section 61.

25. Respondent asserts that the make-ready reimbursements it receives from Complainant and other attachers qualify as CIAC. Furthermore, Respondent provides a copy of Rider D to its Terms and Conditions for providing electric service, approved by the State Corporation Commission of Virginia, that specifically includes the Tax Effect Recovery Factor (TERF) applied to its CIAC. Respondent claims that the TERF funds it collects pass through directly to taxing authorities and, therefore, it derives no direct

[104] Complaint at ¶ 59, *et seq.*

[105] Response at ¶ 105.

[106] Complaint at ¶ 67.

[107] Response at ¶ 105, n. 28.

[108] Complaint, Declaration of David O. Whitt at ¶ 27.

[109] Response, Declaration of Michael C. Roberts at p. 4.

benefit from their assessment.

26. On the other hand, Complainant believes that the reimbursements it provides to Respondent for make-ready represent offsets to Respondent's plant maintenance expense and, consequently, are not subject to a gross up for Federal income tax purposes. Specifically, Complainant notes that FERC Account 593 "shall include the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is includible in account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and Devices, and account 369, Services."[110] Also, according to Complainant, the assignment of the following make-ready items to Account 593 demonstrates that they should be accorded treatment as maintenance expense rather than as a capital item such as CIAC:

> a) Moving line or guy pole in relocation of pole or section of line.
>
> b) Readjusting and changing position of guys and braces.
>
> c) Realigning and straightening poles, crossarms, braces, pins, racks, brackets, and other pole fixtures.
>
> d) Relocating crossarms, racks, brackets and other fixtures on poles.
>
> e) Supporting conductors, transformers, and other fixtures and transferring them to new poles during pole replacements.
>
> f) Resagging, retying, or rearranging position or spacing of conductors.

27. Complainant observes that the IRS Notice upon which Respondent relies is silent with regard to whether make-ready costs may be classified as CIAC, and offers its own IRS support in the form of Private Letter Ruling 90-50-001 (August 21, 1990). This ruling indicates that make-ready costs are properly attributable to the costs of obtaining licenses from utilities and:

> The primary component of make-ready work is the removal and relocation of utility property (lines and related equipment) to provide adequate space for the [attacher's] cables. Such work is a condition of the licenses that must be met before the [attacher] may use the licenses to gain access to the utilities' poles. The costs for such work are simply part of the costs incurred by the utilities and reimbursed by the [attacher] in granting access to their poles. The reimbursements for make-ready work are payments to which the utilities are entitled under the license agreements.

The IRS also concluded that "…. the proper analogy to make-ready costs is damages" which, Complainant points out, are normally not taxed as income, and:

> The costs for make-ready work are part of the costs incurred by the

[110] 18 C.F.R. Part 101, Account 593.

> utilities in issuing the licenses (granting access) to their poles. Reimbursement of these costs by the [attacher] does not convert them from license costs to construction expenditures.

Lastly, Complainant argues that Respondent benefits from applying the TERF because it raises the gateway costs of pole access by nearly 30% and stifles potential competitors' access to Respondent's plant.

28. We believe, from an accounting perspective, that Complainant makes the stronger case. Make-ready costs clearly fit the definition of FERC Account 593, and Respondent fails to demonstrate that make-ready costs qualify also as CIAC subject to TERF. Therefore, the IRS ruling upon which Respondent relies is irrelevant in the immediate case. The IRS ruling to which Complainant refers, on the other hand, definitively states that make-ready reimbursements are not construction expenditures and, consequently, not CIAC. Instead, the reimbursements serve simply to reduce Respondent's net maintenance expenses as Complainant claims. Consequently, the reimbursements should be reclassified as an offset to expenses on Respondent's books for rate-setting purposes. Because Complainant demonstrates that it has been harmed by Respondent's accounting method and imposition of TERF, we will order Respondent to reimburse Complainant for these excess charges.

29. Another issue raised by Complainant is Respondent's assessment of an across-the-board "margin of error" surcharge of approximately 10.5% on all make-ready bills. Complainant claims that Respondent's make-ready bills are insufficiently detailed and it believes, at a minimum, that it is being charged a fully loaded labor rate for make-ready work through the surcharge. Complainant's argument is further fueled by the fact it has never received a make-ready overpayment refund from Respondent, and that empirical support for the surcharge is lacking. In response, Respondent states that the surcharge "is charged for all 'private work' (*i.e.* work unrelated to the provision of electric service) so that electric ratepayers in Virginia are not subsidizing such activities. Furthermore, these rates are applied in a non-discriminatory manner to all CLECs."[111] Although Respondent claims that the surcharge is levied in a non-discriminatory manner, the components of the surcharge remain a mystery and Respondent fails to provide any evidence that justifies the surcharge percentage. Therefore, we will order Respondent to calculate its actual make-ready costs and reimburse Complainant for any excess charges.

30. In addition to the above request for information for the pole count used to calculate rates, we also request Respondent to provide the following: (1) the value of make-ready costs to which the 28-30% tax surcharge was applied; (2) the FERC account(s) in which the tax surcharge is (are) included; (3) any calculations that support the 10% "margin of error" surcharge and (4) the FERC account(s) in which the margin of error surcharge is (are) included.

VIII. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the complaint referenced herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

32. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's four motions referenced herein ARE DENIED.

[111] Response at ¶ 103.

33. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that our determination of certain issues are reserved pending our review of additional information to be provided by Respondent, which we request herein.

34. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent provide to Cable Services Bureau staff, the pole count used to calculate annual pole attachment rates for 1999 and 2000, within 10 days of the release of this Order, as well as any additional information requested by Bureau staff.

35. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent provide to Cable Services Bureau staff, (1) the value of make-ready costs to which the 28-30% tax surcharge was applied; (2) the FERC account(s) in which the tax surcharge is (are) included; (3) any calculations that support the 10% "margin of error" surcharge and (4) the FERC account(s) in which the margin of error surcharge is (are) included, within 30 days of the release of this Order.

36. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL PROVIDE to Complainant (1) an explanation and documentation for all invoices for engineering, make-ready and similar work performed by Respondent on Complainant’s behalf; and (2) access to any engineering or other records that will facilitate Complainant’s access to Respondent’s poles, ducts, conduit, or right-of-ways.

37. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the pole attachment agreements between Respondent and Complaint ARE MODIFIED TO THE EXTENT INDICATED HEREIN.

38. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL PROCEED TO APPROVE WITHOUT DELAY all applications by Complainant for access to poles to which attachment can be made permanently or temporarily, without causing a safety hazard, for which permit applications have been filed with Respondent for longer than 45 days.

39. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL PROCEED to (1) negotiate in good faith terms of access for the deployment of larger poles in those instances when a larger pole is necessary for Complainant to attach; (2) notify attachers of make-ready work and (3) coordinate make-ready work of other attachers and perform any necessary make-ready work on its own facilities in a timely manner.

40. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL CEASE AND DESIST from applying discriminatory standards forbidding Complainant (1) from using extension arms or boxing as methods of attachment; and (2) from utilizing qualified workers who are not employed by Respondent for Complainant’s make-ready work.

41. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL CEASE AND DESIST from (1) requiring Complainant to pay for the correction of safety violations of other attachers; (2) selectively enforcing safety standards or changing the safety standards to which Complainant must adhere; (3) charging application fees; (4) charging a tax or margin of error surcharge on make-ready work.

42. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL REFUND to Complainant, within thirty (30) days of release of this Order, (1) excess payments for tax or margin of error surcharges, which exceeded the actual costs of make-ready work; and (2) payments for make-ready work to correct the safety violations of other attachers, with interest.[112]

43. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL DETERMINE, within thirty (30) days of release of this Order, any overcharges for unproductive engineering work by Respondent's engineers and SHALL REFUND any excess charges to Complainant, with interest.

44. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent SHALL GRANT Complainant access to all of Respondent's transmission structures and conduit, subject to safety and reliability conditions, and SHALL NEGOTIATE IN GOOD FAITH, the terms of such access.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[112] The Commission has determined previously that the current interest rate for Federal tax refunds and additional tax payments is the appropriate rate of interest for overcharges. *See* Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, 79 FCC 2d 232 at ¶ 24 (1980), *order on recon*. 85 FCC 2d 243 (1981).