

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

In the Matter of)	
)	
RCN Telecom Services of Philadelphia, Inc.)	
Complainant,)	File No. PA 01-003
)	
v.)	
)	
PECO Energy Company and Exelon Infrastructure)	
Services, Inc.,)	
Respondent)	

PHASE I ORDER

Adopted: December 17, 2002

Released: December 18, 2002

By the Chief, Enforcement Bureau:

1. In this Order we grant in part a complaint ("Complaint") filed with the Federal Communications Commission ("Commission") by RCN Telecom Services of Philadelphia, Inc. ("RCN") against PECO Energy Company and Exelon Infrastructure Services, Inc. (together "PECO"), pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")¹ and Subpart J of Part 1 of the Commission's rules.² On June 1, 2001, the Cable Services Bureau issued an Order, DA 01-1339,³ allowing RCN to amend its original complaint. The filing date of the amended complaint is May 4, 2001. Upon review of the filings in this matter, we have determined that it is in the interest of justice to bifurcate the issues concerning the annual pole attachment rate from the make-ready issues⁴ raised by RCN. Therefore, in this Order, we grant the Complaint in part and calculate a maximum just and reasonable annual pole attachment rate and reserve resolution of the make-ready issues.

¹ 47 U.S.C. §224.

² 47 C.F.R. §§1.1401-1.1418.

³ *RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company and Exelon Infrastructure Services, Inc.*, DA 01-1339, 16 FCC Rcd 11857 (2001). Effective March 25, 2002, the Commission transferred responsibility for resolving cable programming services tier rate complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, FCC 02-10, 17 FCC Rcd 4672 (2002).

⁴ "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities.

2. Pursuant to the Pole Attachment Act, the Commission has general 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, except where such matters are regulated by a State.⁵ The Commission shall provide that such rates, terms and conditions are just and reasonable.⁶ The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.⁷ Pursuant to this statutory authority, the Commission has developed a formula methodology to determine maximum allowable pole attachment rates to ensure that such rates are just and reasonable.⁸ A utility may not charge more than the maximum amount permitted by the formulas developed by the Commission.

3. The formula developed to resolve complaints concerning rates for attachments by cable systems is known as the Cable Formula.⁹ The Telecommunications Act of 1996 ("1996 Act"),¹⁰ expanded the scope of Section 224 by applying the Cable Formula to rates for pole attachments made by telecommunications carriers¹¹ in addition to cable systems,¹² until the Commission developed a separate formula¹³ for telecommunications carriers. The Commission adopted a Telecommunications Formula ("Telecom Formula"), which became effective February 8, 2001.¹⁴ It applies to all attachments by

⁵ 47 U.S.C. § 224 (b) and (c). Pennsylvania has not certified that it regulates rates, terms and conditions of pole attachments. See *Public Notice, "States That Have Certified That They Regulate Pole Attachments,"* 7 FCC Rcd 1498 (1992).

⁶ 47 U.S.C. §224 (b) (1).

⁷ 47 U.S.C. § 224 (b) (1).

⁸ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 F.C.C. 2d 1585 (1978); *Second Report and Order*, 72 F.C.C. 2d 59 (1979); *Memorandum and Order*, 77 F.C.C. 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*, 15 FCC Rcd 6453 (2000), *pet. for recon. denied in part, Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, FCC 01-170, 16 FCC Rcd 12103 (2001), *appeal pending sub nom. Southern Company Services, Inc. et al. v. FCC*, Case No. 01-1326 (D.C. Cir., filed July 26, 2001).

⁹ 47 C.F.R. §1.1409 (e) (1).

¹⁰ Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹¹ 47 U.S.C. § 153 (44).

¹² 47 U.S.C. § 153 (8); 47 U.S.C. § 602 (5).

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

¹⁴ See 47 U.S.C. § 224 (d) (3) and 47 U.S.C. § 224 (e) (4); *Implementation of Section 703 (e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 at ¶ 102 (1998).

telecommunications carriers and is to be phased in at equal annual increments over a five-year period.¹⁵ The Commission's two formulas differ in only one respect, namely their methodologies for determining the proportion of unusable space on a pole that is attributable to the attachment. The Cable Formula attributes unusable space to an attachment based on the portion of usable space occupied by the attachment, while the Telecom Formula attributes unusable space to a telecommunications attachment based on the total number of attaching entities.¹⁶

4. The present case concerns RCN's attachments to PECO's poles for telecommunications services. As an initial matter, PECO argues that RCN is neither a cable operator nor telecommunications services provider and is not entitled to coverage under the Pole Attachment Act. RCN responds that it has cable franchises for all the territories within which it is attached to PECO's poles and that it offers bundled services, including telecommunications and broadband video services, as well as high-speed Internet access to its customers. PECO provides no evidence to dispute RCN's statements that RCN has entered into cable franchise agreements with all of the communities in which RCN has attached, or has requested attachment, to PECO's poles. As a franchised cable operator, RCN is a proper complainant in this proceeding.¹⁷ PECO also asserts that the Commission does not have jurisdiction in this matter because RCN provides its customers with high-speed Internet access. As the Supreme Court concluded in *NCTA v. Gulf Power Co.*¹⁸ the Commission does have jurisdiction over attachments that are used to provide Internet access simultaneously with cable or telecommunications service, as such commingled services are within the ambit of the Pole Attachment Act.

5. We also reject PECO's argument that because RCN has entered into an agreement with PECO, it cannot complain about the terms of the agreement to the Commission. An attacher may file a complaint pursuant to the Pole Attachment Act challenging the terms of an agreement after the contractual agreement has been executed.¹⁹ Indeed, a pole attachment agreement that includes a clause waiving statutory rights to file a complaint with the Commission is *per se* unreasonable.²⁰ Precluding RCN from challenging the pole attachment fee after entering into the contract would be tantamount to requiring RCN to waive its right to file a complaint with the Commission. The Commission and the Cable Services Bureau have repeatedly affirmed the policy that an attacher cannot be forced to waive its

¹⁵ See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, FCC 01-170, 16 FCC Rcd 12103 at ¶ 2 (2001).

¹⁶ *Id.* at ¶ 53-56.

¹⁷ See 47 USC § 224 (a) (4). ("The term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of way owned or controlled by a utility.") Because we find RCN to be a cable television system, we do not address the issue raised by PECO concerning RCN's previous status as a certified open video system provider.

¹⁸ 534 U.S. 327, 338-339 (2002).

¹⁹ See 47 C.F.R. § 1.1404 (d) (requiring that a complaint be accompanied by a copy of any existing pole attachment agreement). See also S. Rep. No. 95-580, at 16 (1977), 1978 U.S.C.C.A.N. 109, 124 (anticipating Commission jurisdiction where the communications space is already occupied by the cable television system.)

²⁰ See e.g., Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, 12 FCC Rcd 942 (CSB 1997).

right to federal, state, or local regulatory relief as a condition of attachment.²¹

6. As a final threshold issue, we reject PECO's argument that it is entitled to charge a market rate for its attachments because our existing formula does not provide just compensation. In *Alabama Cable v. Alabama Power*²² the Commission concluded that the Commission's pole attachment formulas, together with the payment of make-ready expenses, provide compensation that exceeds just compensation. In affirming this decision, the Eleventh Circuit Court of Appeals concluded that absent proof that each pole is at full capacity and evidence of either another available buyer waiting to use the space or the power company's ability to put the space to a higher-valued use with its own operations (evidence lacking here), the Commission's formula "(which provides for much more than marginal cost) necessarily provides just compensation."²³

7. We turn now to the appropriate pole attachment rate here. Because the Complaint was filed on May 4, 2001, we apply the Cable Formula plus one fifth of the differential between the Cable Formula rate and the fully implemented Telecom Formula rate to calculate the maximum rate.²⁴ Regarding the number of attaching entities, we follow the Commission's guidance in *Teleport v. Georgia Power*,²⁵ for the period from May 4, 2001 through July 30, 2001, and the presumptions adopted by the Commission in the *Consolidated Order*²⁶ beginning July 31, 2001. In *Teleport v. Georgia Power*, the Commission concluded that the presumptions of three or five attaching entities, proposed by the complainant, were reasonable for the period prior to the effective date of the *Consolidated Order*. Unlike *Teleport v. Georgia Power*, however, in this case, RCN proffered an average number of attachers of three and one-half.²⁷ PECO failed to provide any support for its alternative proposal of three attaching entities²⁸ and thus, we rely on RCN's proposal of three and one-half attachers, in the absence of any evidence by PECO in support of a different average number.²⁹ Therefore, for the period May 4, 2001

²¹ See *Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 F.C.C. 2d 1585 at ¶ 16 (1978); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6790 and n. 90 (1998); *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563 (CSB 2000).

²² *Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, 16 FCC Rcd 12209 at ¶¶ 32-61 (2001), *affirmed Alabama Power Company v. FCC*, Case No. 00-14763 (11th Cir., November 14, 2002).

²³ *Alabama Power Company v. FCC*, Case No. 00-14763 (11th Cir., November 14, 2002).

²⁴ See 47 U.S.C. § 224 (e) (4); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998).

²⁵ *Teleport Communications Atlanta, Inc. v. Georgia Power Company*, FCC 02-270 (released: October 8, 2002).

²⁶ *Amendment of Rules and Policies Governing Pole Attachments*, FCC 01-170, 16 FCC Rcd 12103 (2001)), *appeal pending sub nom. Southern Company Services, Inc. et al. v. FCC*, Case No. 01-1326 (D.C. Cir., filed July 26, 2001).

²⁷ Statement of Jonathan Troy Stinson, RCN's Reply at Exhibit C.

²⁸ PECO's Response to Amended Complaint at p. 59 ("PECO has not had the opportunity to develop a statistically valid survey").

²⁹ 47 C.F.R. § 1.1409 (a) ("Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.").

through July 30, 2001 the period after the Complaint was filed but before the publication of the *Consolidated Order* in the Federal Register, we use the presumption of three and one-half attaching entities in our calculation. For the period beginning July 31, 2001 we revert to the presumptions of three for non-urbanized (less than 50,000 population) areas and five for urbanized (more than 50,000 population) areas as adopted in the *Consolidated Order*. Neither party produced the type or extent of evidence required by the *Consolidated Order* to overcome these presumptions for this time period, such as a statistically valid survey or actual data. Because the record does not reflect the specific geographic areas involved, we have calculated rates for both three, three and one-half, and five attaching entities and the rates should be applied in the appropriate areas for the appropriate time periods.

8. In calculating PECO's maximum rate, we calculate the net cost of a bare pole by subtracting accumulated depreciation and net deferred operating income taxes from the gross pole investment in order to arrive at the net pole investment. As we recently reiterated in *NSCTA v. Nevada Bell*,³⁰ when applying the pole attachment formula to electric utilities, we generally prorate the pole accumulated depreciation using publicly available information about the plant accumulated depreciation. We divide the gross pole investment by the gross plant investment and multiply that figure by the plant accumulated depreciation to determine what portion of the plant accumulated depreciation is reasonably related to gross pole investment.³¹ That is precisely the methodology that we used in calculating PECO's pole attachment rate.³² In its rate calculation, by contrast, PECO calculated its pole accumulated depreciation by subtracting its depreciable plant base from its gross pole investment. PECO offers no explanation why we should deviate from our standard methodology nor does PECO provide any analysis in support of its deviation. Based on our review, we conclude that PECO's proposed methodology does not provide an accurate assessment of the pole accumulated depreciation and we therefore reject it.

9. We calculate the maximum pole attachment rates using data from PECO's 1999 FERC Form 1.³³ Using this information and applying the Cable Formula we calculate a maximum just and reasonable annual cable rate of \$6.79 per pole attachment.³⁴ Using the same information and applying the Telecom Formula for telecommunications attachments, we calculate a fully implemented maximum just and reasonable annual rate of \$10.26 for attachments in areas with a presumptive average number of five attachers;³⁵ a fully implemented maximum just and reasonable annual rate of \$13.62 for attachments in areas with a presumptive average number of three and one-half attachers;³⁶ and a fully implemented maximum just and reasonable annual rate of \$15.48 for attachments in areas with a presumptive average

³⁰ *In the Matter of Nevada State Cable Television Association v. Nevada Bell*, 17 FCC Rcd 15534 at ¶ 13 (EB 2002).

³¹ *Id.* at ¶ 13.

³² In cases such as this, where the utility provides both electric and other services, we use the total electric plant for our calculations, except for the tax element. See *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 at n. *** (1987).

³³ While PECO has requested that certain of its financial information be kept confidential, we do not need to reach the issue of confidentiality because we use only publicly available information to calculate PECO's maximum rate.

³⁴ Our calculations are set forth in Attachment A to this Order.

³⁵ Our calculations are set forth in Attachment B to this Order.

³⁶ Our calculations are set forth in Attachment B to this Order.

number of three attachers.³⁷ For areas with an average of five attachers, the first year rate is \$7.48; for areas with an average of three and one-half attachers, the first year rate is \$8.16; for areas with an average of three attachers, the first year rate is \$8.53. Consequently, we find that Respondent's actual pole attachment rate of \$47.25 is not just and reasonable.

10. Accordingly, IT IS ORDERED, pursuant to Sections 0.111, 0.311 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and §§ 1.1401-1.1418, that the relief requested in the Complaint IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1410, that the annual pole attachment rate of \$47.25 IS UNREASONABLE and IS TERMINATED, effective upon the release of this Order.

12. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1410, that the annual respective rates of \$7.48, \$8.16 and \$8.53 for each pole attachment ARE SUBSTITUTED for the rate of \$47.25, effective upon the release of this Order.

13. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1410, that Respondent SHALL REFUND to Complainant, within thirty (30) days of the release of this Order, that portion of the amount paid in excess of the respective rates listed above, for the period from May 4, 2001 to the present, plus interest to the date of refund.

14. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1401-1.1418, that PECO and RCN SHALL NEGOTIATE IN GOOD FAITH, maximum just and reasonable rates for pole attachments for charges based on changes in PECO's FERC Form 1, in accordance with the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

³⁷ Our calculations are set forth in Attachment B to this Order.

Attachment A
Pole Attachment Formulas and Calculations

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Carrying Charge Rate}}$$

Maximum Rate

Space Occupied by Attachment	(A)	1
Total Usable Space	(B)	13.5
Net Cost of a Bare Pole	(C)	\$40.84
Carrying Charge Rate	(D)	2.2442
Maximum Rate per Pole	(A\B) x C x D	\$6.79

Net Cost of a Bare Pole

(1) Gross Pole Investment	\$311,042,370
(2) Depreciation Reserve (Poles)	\$243,965,632
(3) Net Deferred Operating Income Taxes (Electric Plant)	\$2,238,042,911
(4) Gross Plant Investment (Electric)	\$14,626,785,648
(5) Net Deferred Operating Income Taxes (Poles) ((L(1)/L(4) x L(3))	\$47,592,560
(6) Net Investment (Poles) (L(1)-L(2)-L(5))	\$19,484,178
(7) Net Investment (Bare Pole) (L(6) x .85)	\$16,561,551
(8) Number of Poles	405,570
(9) Net Cost of a Bare Pole (L(7)/L(8))	\$40.84

Carrying Charge Rate

(1) Administrative Charge	0.3634
(2) Maintenance Charge	1.0683
(3) Depreciation Charge	0.3592
(4) Taxes	0.3410
(5) Return on Investment	0.1123
(6) Total Carrying Charge (L(1)+L(2)+L(3)+L(4)+L(5))	2.2442

Administrative Charge

(1) Total G&A Expenses	\$332,918,874
(2) Gross Plant Investment	\$14,626,785,648
(3) Depreciation Reserve (Plant)	\$11,472,498,140
(4) Accumulated Deferred Taxes (Plant)	\$2,238,042,911
(5) Net Investment (Plant)	\$916,244,597
(6) Administrative Charge (L(1)/L(5))	0.3634

Maintenance Charge

(1) Maintenance Expense	\$71,410,003
(2) Gross Investment (364, 365, 369)	\$1,067,045,574
(3) Depreciation Reserve (364, 365, 369)	\$836,935,651
(4) Accumulated Deferred Taxes (364, 365, 369)	\$163,268,529
(5) Net Investment (364, 365, 369)	\$66,841,394
(6) Maintenance Charge (L(1)/L(5))	1.0683

Depreciation Charge

(1) Depreciation Rate	0.0225
(2) Gross Pole Investment	\$311,042,370
(3) Depreciation Reserve (Pole)	\$243,965,632
(4) Accumulated Deferred Taxes (Pole)	\$47,592,560
(5) Net Investment (Poles)	\$19,484,178
(6) Depreciation Charge (L(1) x (L(2)/L(5))	0.3592

Taxes

(1) Total Current and Deferred Taxes	\$639,281,736
(2) Net Plant Investment	\$1,874,780,313
(3) Taxes (L(1)/L(2))	0.3410

Return on Investment

Authorized by State Regulatory Commission	0.1123
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Attachment B
Pole Attachment Formulas and Calculations

$$\left| \begin{array}{l} \text{Maximum} \\ \text{Rate} \end{array} \right| = \left[\frac{\left(\begin{array}{c} \text{Space} \\ \text{Occupied} \end{array} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right] \times \text{Net Cost of a Bare Pole} \times \left| \begin{array}{c} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{array} \right|$$

Maximum Rate

Space Occupied by Attachment	(A)	1
Total Unusable Space	(B)	24.0
Pole Height	(C)	37.5
Number of Attaching Entities	(D)	5.0
Net Cost of a Bare Pole	(E)	\$40.84*
Carrying Charge Rate	(F)	2.2442*

Maximum Rate per Pole $[(A + 2/3 \times (B/D))/C] \times E \times F$

\$10.26

\$10.26 - \$6.79 = \$3.47/5 = \$0.69 + \$6.79 = \$7.48 as of 2/8/01

*See Attachment A calculation

Maximum Rate

Space Occupied by Attachment	(A)	1
Total Unusable Space	(B)	24.0
Pole Height	(C)	37.5
Number of Attaching Entities	(D)	3.0
Net Cost of a Bare Pole	(E)	\$40.84*
Carrying Charge Rate	(F)	2.2442*

Maximum Rate per Pole $[(A + 2/3 \times (B/D))/C] \times E \times F$

\$15.48

\$15.48 - \$6.79 = \$8.69/5 = \$1.74 + \$6.79 = \$8.53 as of 2/8/01

*See Attachment A calculation

Maximum Rate

Space Occupied by Attachment	(A)	1
Total Unusable Space	(B)	24.0
Pole Height	(C)	37.5
Number of Attaching Entities	(D)	3.5
Net Cost of a Bare Pole	(E)	\$40.84*
Carrying Charge Rate	(F)	2.2442*

Maximum Rate per Pole	$[(A + 2/3 \times (B/D))/C] \times E \times F$	\$13.62
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$\$13.62 - \$6.79 = \$6.83/5 = \$1.37 + \$6.79 = \8.16 as of 2/8/01

*See Attachment A calculation