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

In the Matter of	)	
	)	
Mile Hi Cable Partners, LP; Mountain States Video, Inc., d/b/a TCI of Colorado, Inc.; United Cable Television of Colorado, Inc., d/b/a TCI of Colorado, Inc.; TCI Cablevision of Colorado, Inc.; Heritage Cablevision of Tennessee, Inc.; and TCI Cablevision of Florida, Inc.,	)	File No. PA 98-003
Complainant	)	
	)	
v.	)	
	)	
Public Service Company of Colorado,	)	
Respondent/Applicant	)	
	)	
Application for Review	)	

ORDER

Adopted: March 25, 2002 **Released: March 28, 2002**

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application for review ("Application"), filed by Respondent on July 31, 2000, of an Order released by the Cable Services Bureau ("Bureau") under delegated authority. The Order, DA 00-1476 ("Bureau Order"),[1] granted in part Complainant's pole attachment complaint ("Complaint") filed pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")[2] and Subpart J of the Commission's Rules.[3] Complainant filed an opposition to the Application ("Opposition") on August 15, 2000, and Respondent filed its reply to the Opposition ("Reply") on August 25, 2000. The Bureau Order found that penalty fees, charged by Respondent for Complainant's allegedly unauthorized pole attachments,[4] were excessive. It also concluded that Respondent's retroactive

[1] *Mile Hi Cable Partners, LP, et al. v. Public Service Company of Colorado*, 15 FCC Rcd 11450 (2000).

[2] 47 U.S.C. § 224.

[3] 47 C.F.R. §§ 1.1401–1.1418.

[4] Pole attachment contracts generally provide for an application process by which an attacher notifies a utility pole owner of the poles to which it wishes to attach. Unauthorized attachments are those attachments for which no application was filed.

imposition of an application process to drop poles[5] was not just and reasonable. It required Respondent to recalculate the total unauthorized pole attachment penalties imposed on Complainant; to recalculate its costs for its pole attachment survey; and to allow Complainant access to the records necessary to verify the count and the cost. In this order we deny Respondent's Application and affirm the Bureau Order as modified herein.

II. BACKGROUND

2. Pursuant to the Pole Attachment Act, the Commission has 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 Pole Attachment Act provides that such rates, terms and conditions must be just and reasonable.[6] 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.[7] The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[8] 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."[9]

3. In 1996 and 1997, Respondent conducted an inventory of its poles. At the conclusion of that inventory, Respondent claimed that Complainant had made numerous unauthorized pole attachments. Respondent's inventory count included attachments to both mainline poles and drop poles. The inventory also indicated that in some areas Complainant was attached to fewer poles than the number for which Complainant had been paying. When Complainant refused to pay Respondent's bills for the allegedly unauthorized attachments and the survey costs, Respondent sued in Colorado State court for breach of contract. In response, Complainant filed a complaint with the Commission, alleging that Respondent had

[5] Mainline poles are typically poles along roads and other public rights of way. A drop pole is typically a pole that takes a cable from a mainline pole to a customer's premises that is unusually far from a mainline pole, such as across a road or far back from a road.

[6] 47 U.S.C. § 224 (b) (1).

[7] 47 U.S.C. § 224(b)(1) and (2). Colorado 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).

[8] 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 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).

[9] *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, 471 (1989).

violated the Pole Attachment Act. The State court invoked the doctrine of primary jurisdiction and stayed Respondent's suit pending clarification by the Commission of the parties' rights under the Pole Attachment Act.[10]

III. BUREAU ORDER

4. The Bureau Order concluded that the amount of any unauthorized attachment and the circumstances under which it is imposed must be just and reasonable. The Bureau Order found that Complainant met its burden to show that Respondent's $250.00 per pole unauthorized attachment fee is not just and reasonable. It further concluded that a reasonable fee for unauthorized attachments in this case will equal five times the annual pole attachment fee per pole per unauthorized attachment plus interest.[11] This amount comported with information submitted by Complainant concerning industry practice as well as with the Bureau's own experience with unauthorized attachment fees.

5. The Bureau reasoned that Respondent's argument, that the cost avoided by Complainant for unauthorized attachments is the present value of fourteen years of annual fees plus some speculative amount related to alleged increased safety risks and administrative costs, was not supportable. The Bureau refused to infer, based on the evidence presented, that the unauthorized attachments at issue could have existed for fourteen years. The Bureau also reasoned that Complainant must always comply with safety requirements; pay to correct any safety violations; and pay for any damages resulting from its own safety violations. Because Complainant is under the same obligation to make its attachments safely and incurs the same liability for any safety violations for unauthorized attachments as it does for authorized ones, the Bureau concluded that there is no cost avoided by Complainant related to safety issues and no cost incurred by Respondent related to safety issues, as a result of unauthorized attachments. The Bureau also concluded that the parties did not include drop poles in the authorization process prior to December 29, 1997, when Respondent informed Complainant that drop poles would be included in the authorization process.

IV. APPLICATION FOR REVIEW

6. In its Application, Respondent argues that the Bureau exceeded its jurisdictional authority under the Pole Attachment Act when it concluded that Respondent's charges to Complainant for unauthorized attachments were not just and reasonable. Respondent also asserts that Complainant should not be able to contest an unauthorized attachment fee provision after entering into a contract. Respondent argues that the Order constitutes arbitrary and capricious agency action because 1) the unauthorized attachment fee authorized by the Bureau Order is not large enough to deter unauthorized attachments; 2)

[10] *See Public Service Company of Colorado v. Mile Hi Cable Partners, LP, et al*., 995 P.2d 310 (Co. 1999).

[11] An important aspect of the Bureau Order is the requirement that Respondent provide Complainant with the record documentation of its survey so that Complainant can verify the unauthorized attachment count. Respondent's charges to Complainant for unauthorized pole attachments were based on a survey that identified the allegedly unauthorized attachments but also revealed that Complainant had paid an annual pole attachment fee for non-existent attachments. For example, in several instances Respondent's survey revealed that Complainant was attached to fewer poles, including those alleged to be unauthorized, than the number for which Complainant had been paying the annual fee. Even though Complainant had over compensated Respondent for these poles, Respondent billed Complainant for the allegedly unauthorized attachments without granting Complainant an offset for the overpayment.

the Complainant will avoid responsibility and liability at Respondent's expense for damages that might occur from its unauthorized attachments; and 3) the decision to exclude unauthorized attachment fees for drop poles prior to 1998 was not based on reasoned analysis. Respondent claims that the Bureau erred by giving credibility to Complainant's evidence concerning the industry standard for unauthorized attachment fees.

V. DISCUSSION

7. 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.[12] The issue in this matter is not whether the Complainant failed to pay an invoice based on a just and reasonable term or condition, but whether the term or condition itself was reasonable. We previously concluded in this matter that we have jurisdiction over the terms and conditions imposed on the pole attachment authorization process and any associated fees or penalties.[13] The Bureau's decision is well within the Commission's jurisdiction under the Pole Attachment Act to ensure that conditions of pole attachment agreements are just and reasonable. We have also repeatedly affirmed our conclusion that an attacher cannot be forced to waive its right to federal, state, or local regulatory relief as a condition of attachment.[14] An attacher may file a complaint pursuant to the Pole Attachment Act after a contract has been executed.[15] We have concluded that a pole attachment agreement that includes a clause waiving statutory rights to file a complaint with the Commission is *per se* unreasonable.[16] Precluding Complainant from raising the unauthorized attachment fee issue after entering into the contract would be tantamount to requiring Complainant to waive its right to file a complaint with the Commission.

8. The Bureau reasonably concluded that a just and reasonable unauthorized attachment fee will provide incentive for Complainant to comply with a reasonable applications process, while encouraging utilities not to delay audits of unauthorized attachments. In setting reasonable terms and conditions in pole attachment cases, we consider the prevailing industry practices.[17] Complainant included

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[12] *Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, 16 FCC Rcd 12209, 12217 (2001), *appeal pending sub nom. Alabama Power Company v. FCC*, Case No. 01-13058-B (11th Cir.).

[13] *Mile Hi Cable Partners, LP, et al. v. Public Service Company of Colorado*, 14 FCC Rcd 3244, 3248 (1999).

[14] *See* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777, 6790 and n.90 (1998), *rev'd in part on other grounds*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted*, *FCC v. Gulf Power Co*., 531 U.S. 1125 (2001); *See also*, *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563 (2000).

[15] *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.)

[16] *Id. See also*, Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, 12 FCC Rcd 942 (1997).

[17] *See Alert Cable TV of North Carolina, Inc. v. Carolina Power & Light Co*., 1985 LEXIS 3679 ¶ 5 (C.C.B. 1985), citing *Adoption of Rules for the Regulation of Cable Television Attachments*, 68 F.C.C.2d 1585, 1590 (1978). *See also*, S. Rep. No. 95-580, at 21 (1977), 1978 U.S.C.C.A.N. 109, 129) ("The committee believes that the open

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the affidavit of its cable pole attachment expert, Michael Kruger, as evidence of industry standards.[18] Mr. Kruger opined, and an attached survey of unauthorized attachment fee provisions in pole attachment agreements attached to complaints on file with the FCC showed, that the industry standard was a one-time charge of $15.00 to $25.00 per pole, or charges based on back rent for no more than three years, which charges would be no more than $30.00.[19] Respondent offered no countervailing evidence. The Bureau properly considered all pertinent evidence presented regarding an appropriate charge for unauthorized attachments.

9. We find that the Bureau's determination -- i.e., that a just and reasonable unauthorized attachment fee is five times the annual rent that Complainant would have paid if the attachment had been authorized -- is appropriate in these circumstances. Here, the Complainant acquired the systems in question between 1991 and 1993 (except for one that was acquired in 1988), on average about 5 years before Respondent commenced its survey of Complainant's attachments to Respondent's poles.[20] We believe it would be unreasonable to subject Complainant to unauthorized attachment fees for essentially the 10 years prior to it even owning and controlling the attachments in question, particularly where as here Respondent itself did not conduct systemic surveys of its poles.[21] In determining a just and reasonable fee, we must balance the need to provide an effective remedy with the need to encourage utilities not to delay audits of unauthorized attachments. We believe that a fee equal to five times the annual rent strikes the necessary balance under these circumstances.

10. In addition, the Bureau's conclusion is consistent with general contract principles that prohibit the enforcement of unreasonable penalties for breach of contract.[22] An attaching party need not

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standard of 'just and reasonable' is at the same time sufficiently precise and flexible to permit the commission to make determinations when presented with specific contractual provisions alleged to be excessively onerous or unfair. In any event, the fairness of any term or condition of a CATV pole-leasing agreement will have to be judged in relation to other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges, matters which cannot be precisely translated into statutory language.")

[18] Complaint ¶ 27, Exhibit 5 (Kruger Declaration ¶ 3).

[19] Complaint ¶ 28, Exhibit 5 (Kruger Declaration ¶ 3) and Exhibit 10 (survey of damages for unauthorized attachments); Reply of Complainant, filed Aug. 17, 1998, at 9. It was also revealed that one contract signed by Complainant has a penalty of $750.00 for unauthorized attachments. (Motion to Dismiss at 15; Answer at 15). According to Complainant, however, several cable-utility contracts have no penalty. Reply of Complainant, filed Aug. 17, 1998, at 6. These extremes are enlightening, but neither establishes an industry standard.

[20] *See* Bureau Order at ¶ 4.

[21] *See* Respondent's "Answers of Public Service Company of Colorado to Questions of the Cable Services Bureau," at Questions 1 and 2 (filed May 3, 1999).

[22] *See, e.g.*, *Space Master International, Inc. v. City of Worcester*, 940 F.2d 16, 17-18 (1st Cir. 1991) citing *Priebe & Sons v. Unites States*, 332 U.S. 407, 411-414 (1947); *Restatement (Second) of Contracts* § 356 (1979 Main Vol.) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."); *Perino v.*
continued….

engage in the type of behavior that would support exemplary or punitive damages in order to incur a reasonable unauthorized attachment fee.[23] In the instant case, there is no basis in the record to support a conclusion that Respondent is entitled to exemplary or punitive damages beyond compensatory damages, and indeed, Respondent has attempted to justify its fee in terms of its actual losses.[24] Respondent was unable to support its claim for the present value of fourteen years of annual fees plus some speculative amount related to alleged increased safety risks and administrative costs. Just and reasonable administrative costs associated with a pole attachment survey are fully recoverable in addition to any unauthorized attachment fee and therefore may not be included in the unauthorized attachment fee.[25] Complainant must also pay all just and reasonable costs associated with safety compliance issues in addition to any unauthorized attachment fee.[26] Respondent was unable to provide support for actual losses in excess of the unauthorized attachment fee approved by the Bureau.

11. We affirm the Bureau's conclusion regarding a reasonable unauthorized attachment fee in this case. We conclude, however, that it was unnecessary for the Bureau to establish a standard of general applicability regarding reasonable unauthorized attachment fees.[27] Therefore, we affirm the Bureau Order to the extent that, based on the facts of this case, a reasonable unauthorized attachment fee is five times the annual per pole attachment fee plus interest. As discussed above, we believe the record in this matter supports this determination.

12. Respondent also argues that the Pole Attachment Act and the parties' contracts do not distinguish between mainline and drop poles and Respondent may apply all contract terms, including advance authorization, rent, and unauthorized attachment fee requirements, to drop poles. The Bureau Order found that Complainant presented sufficient evidence to the contrary, and we agree. The evidence introduced by the parties, and cited by the Bureau, supported the finding that it was the specific practice of Respondent not to require that Complainant gain advance authorization for drop poles (or, therefore, to pay fees for them) until 1998. The Bureau reasonably concluded, based on the evidence presented, that

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Jarvis, 312 P.2d 108 (Colo. 1957).

[23] *Cf. Williamsburg Cablevision v. Carolina Power and Light Co*., PA 82-007, and *Alert Cable TV of North Carolina, Inc. v. Carolina Power and Light*, PA 82-0012, 52 R.R. 2d. 1697, 1706, *aff'd sub nom. Alert Cable TV of North Carolina, Inc. v Carolina Power and Light Company*, 1985 FCC LEXIS 3679 (1985).

[24] Our conclusion does not preclude a finding, under other circumstances, that action by an attacher might support a penalty reflecting exemplary or punitive damages.

[25] *See* Bureau Order at ¶¶ 8-9. *See also*, *Cable Texas, Inc. v. Entergy Services, Inc*., 14 FCC Rcd 6647, 6652 (1999); *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd 2610, 2611 (1992).

[26] Complainant not only has a contractual obligation to comply with the application process, but also has a separate obligation to comply with state and local government safety codes. Complainant must follow the agreed to application process to ensure that the location of its attachments in relation to Respondent's attachments is in compliance with these safety codes.

[27] *See* Bureau Order at ¶ 14 (determining reasonable unauthorized attachment fees in those cases where a pole attachment survey was completed less than five years before the discovery of unauthorized attachments).

Respondent could charge an annual pole attachment fee for drop poles beginning in 1998, after the date it provided Complainant with notice that it would charge an annual fee for drop poles. We agree that it would be unjust and unreasonable to allow Respondent to collect unauthorized attachment fees for drop poles when Respondent has provided no evidence to contradict Complainant's evidence that prior to 1998, Complainant was not required to apply for, or pay for, attachments to drop poles.

13. Finally, Respondent argues that the Bureau Order amounts to an unconstitutional confiscation of Respondent's property. Because the Bureau Order requires Complainant to provide compensation plus interest to Respondent in an amount that equals or exceeds Respondent's actual losses of rental income and costs associated with safety violations, there is no basis to Respondent's claim of unconstitutional confiscation. We conclude that the Bureau Order allowed Respondent to recover just and reasonable compensation for Complainant's use of Respondent's poles.

VI. CONCLUSION AND ORDERING CLAUSE

14. For the reasons discussed above, we conclude that Respondent's application for review should be denied.

15. Accordingly, IT IS ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review of In the Matter of Mile Hi Cable Partners, LP, et al. v. Public Service Company of Colorado, PA 98-003, DA 00-1476, 15 FCC Rcd 11450 (2000) IS DENIED.

16. IT IS FURTHER ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that In the Matter of Mile Hi Cable Partners, LP, et al. v. Public Service Company of Colorado, PA 98-003, DA 00-1476, 15 FCC Rcd 11450 (2000) IS AFFIRMED AS MODIFIED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary