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A PRACTICAL PRIMER ON POLE ATTACHMENTS

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In the years since the enactment of the Telecommunications Act of 1996, requests for attachments to poles, ducts, conduits and rights of way have increased dramatically.¹ Unfortunately, many municipal entities that have received such requests have found that their existing agreements are dated and inadequate.²

Most pole attachment agreements in use today were negotiated -- or are based on agreements that were negotiated -- many years or even decades ago. Back then, poles, ducts, conduits and rights of way were typically occupied by at most three users – a single telephone company, a single cable television provider and a single electric utility. These entities coexisted in relative harmony, exchanging reciprocal benefits, charging minimal pole attachment rates to each other, and rarely caring much about full cost recovery. Few, if any, pole attachment agreements were written to cope with the possibility that many additional entities might seek attachments that would strain capacity, require complex relocations or change-outs, increase safety risks, create perplexing accounting problems and swell administrative costs. None anticipated the Telecommunications Act’s fundamental changes to the legal landscape or the fact that all attachers might someday become competitors in the provision of a wide range of communications (and energy) services.

Local governments that own or operate – or are considering owning or operating – poles, ducts, conduits and/or rights of way need pole-attachment agreements that comply with all current legal requirements and safety standards, facilitate maximum lawful cost recovery, and afford sufficient

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¹ Following the practice of the Federal Communications Commission (“FCC”), this article refers to attachments to poles, conduits, ducts and rights of way collectively as “pole attachments,” unless otherwise specified.

² For the purposes of this article, the term “municipal entities” includes state, county and local governments; their gas, water, electric and other utilities; and their commissions, councils and other bodies that own or operate poles, ducts, conduits or rights of way.

flexibility to accommodate new developments in the years ahead. Local governments also have a strong incentive to upgrade their pole attachment agreements because the Telecommunications Act's competitive-neutrality and non-discrimination provisions could amplify and perpetuate the effects of any mistakes that a local government might make.

In this article, we review the relevant considerations and options available to municipal entities and describe an approach that municipal entities in at least five states are using to manage the pole attachment process in an innovative and cost-effective manner.

I. OVERVIEW OF FEDERAL REGULATION OF POLE ATTACHMENTS

As is true of many areas of communications law, pole attachments are governed by an arcane mix of federal, state and local requirements. Here, we will focus primarily on the major federal requirements. We begin by explaining why municipal entities, which are generally exempt from federal pole attachment regulation, should nevertheless pay heed to the federal requirements. We then discuss the two relevant federal statutes and some of the FCC's key interpretations of them.

A. Why Exempt Municipal Entities Should Care About Federal Requirements

As discussed below, the so-called "Municipal Exemption" generally exempts units of local government from federal regulation of pole attachments.³ Even so, municipal entities should understand and stay abreast of the federal requirements and standards. First, some states (such as Texas and Colorado) expressly incorporate federal requirements into state law, either through state statutes or regulations or through the interpretations and decisions of state public service commissions. Second, the FCC's body of regulations, interpretations and decisions has grown to cover an increasing number of fact situations. Over the last two years, federal appellate and Supreme Court decisions have upheld the majority of these FCC interpretations, thus removing some of the uncertainty surrounding them. These decisions will likely bolster the arguments of persons seeking pole attachments from exempt municipal entities who increasingly point to the federal requirements and standards as *de facto* benchmarks of what is fair and reasonable. Third, municipal entities that have historically charged relatively low rates for pole attachments may find that the new federal formulas furnish support for increasing their rates.⁴

Furthermore, Section 253(a) of the Telecommunications Act prohibits local governments from erecting barriers to entry, subject to the safe harbor that Section 253(c) provides for local management of public rights of way on a competitively-neutral and non-discriminatory basis. Local governments must therefore take care not to adopt pole attachment requirements that the FCC or courts would view as unreasonable or discriminatory barriers to entry. This is particularly important in situations in which a municipal entity is itself seeking to become a provider of cable or telecommunications services.⁵

³ Section 224(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 224(a).

⁴ In a survey conducted in 1997, the National Rural Electric Cooperative Association found that 75 percent of its members were not recovering third-parties' proportionate share of costs of poles. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report*, FCC 97-423 ¶ 225 (rel. Jan. 13, 1998) ("*Fourth Annual Report on Cable Competition*").

⁵ In 1997, two trade associations for small cable operators asked the FCC to recommend that Congress eliminate the Municipal Exemption because municipalities and cooperatives were

B. Governing Federal Statutes

1. The Pole Attachment Act of 1978

In 1978, to ensure that telephone companies and electric utilities would not stifle the growth of the then-fledgling cable television industry by charging excessive rates for essential pole attachments, Congress enacted the Pole Attachment Act 1978 (the “Pole Attachment Act”). The Act added a new Section 224 to the Communications Act of 1934 to authorize the FCC to regulate the *rates* that utilities could charge cable television systems for pole attachments. The Act did not require utilities to give cable operators *access* to their facilities but merely limited the rates they could charge if they voluntarily chose to give such access.

Specifically, in Section 224(b)(1), Congress required the FCC to “regulate the rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.” Section 224(d)(1), in turn, specified that a rate was “just and reasonable” if it “assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of usable space, or the percentage of total duct or conduit capacity, which is occupied by the pole attachment, by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduct, or right of way.” The FCC’s rate ceilings were to apply only if utilities and attachers could not voluntarily reach mutually satisfactory agreements. Section 224(b)(1) also required the FCC to establish procedures to hear and resolve complaints regarding pole attachments and to enforce the requirements of the Section 224.

The Pole Attachment Act provided two important exceptions. First, in Section 224(c), Congress authorized states to preempt federal regulation by electing to regulate pole attachments themselves. Nineteen states subsequently did so: Alaska, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Utah, Vermont and Washington. When dealing with pole attachments in these states, one must look first to their statutes, interpretations and decisions to determine whether they have addressed the issue(s) in question.

Second, in Section 224(a)(1), Congress excluded railroads, cooperatives and government entities from the utilities to which the pole attachment requirements of Section 224 applied by specifying that “Such term does not include any railroad, any person who is cooperatively organized, or any person

abusing it. After conducting an inquiry, the FCC declined to make such a recommendation at that time. The FCC intimated, however, that it might do so in the future if circumstances warranted, noting that “[w]hen these cooperatives and municipal entities are themselves engaged in the provision of communications services a conflict of interest may result such that the rates charged to competitors may no longer be cost based and that competition may accordingly be distorted.” *Fourth Annual Report on Cable Competition*, ¶ 226. Similarly, in 2001 the Ad Hoc Committee of the National Association of Regulatory Utility Commissioners (NARUC) recommended that the states eliminate the “municipal exemption” and adopt rules applicable to municipal utilities that are comparable to the federal cable pole attachment rules. This recommendation was in part premised on the emergence of competitive municipal communications service offerings.

owned by the Federal Government or any State.”⁶ As applied to units of local government, this exclusion has come to be known as the “Municipal Exemption.”

2. The Telecommunications Act of 1996

In the Telecommunications Act of 1996, Congress sought to facilitate the prompt emergence of robust competition in all communications markets by creating competitively-neutral, non-discriminatory and pro-competitive conditions in each of these markets. In furtherance of this objective, Congress treated poles, ducts, conduits and rights of way as potential “bottleneck” facilities and, in Section 703 of the Act, broadly expanded the FCC’s authority over them.

With respect to access, Congress filled a perceived gap in the Pole Attachment Act by adding a new Section 224(f)(1), which requires every covered utility 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.”⁷ Section 224(f)(2) creates a limited exception for electric utilities “where there is insufficient capacity for reasons of safety, reliability or generally applicable engineering purposes.”

As to rates, Congress extended the existing “cable rate” under Section 224(d) indefinitely into the future for cable television systems that “solely . . . provide cable service.” Congress also made the “cable rate” applicable on an interim basis to telecommunications carriers, including cable systems that provide telecommunications services, until a new formula under Section 224(e) went into effect on February 8, 2001. The new “telecommunications rate” formula under Section 224(e) partially removes the subsidy inherent in the existing “cable rate” formula by dividing poles and conduits into “usable” and “other than usable space.” For “other than usable space,” Section 224(e)(2) requires a utility to allocate costs among attaching entities so that each bears 2/3 of what it would have to pay under an equal allocation of the costs attributable to that space. For “usable space,” Section 224(e)(3) requires a utility to allocate recoverable costs among all attaching entities according to the percentage of usable space that each requires.

At the same time, Congress continued to allow states to elect to preempt federal regulation, and it extended the exemption for railroads, cooperatives and government entities so that the exemption now covers access as well as rates.

⁶ The term “State” is defined in Section 224(a)(3) as “any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency or instrumentality thereof.”

⁷ Section 224(a)(5) excludes incumbent local exchange carriers from the class of “telecommunications carriers” that are entitled to regulated pole attachment rates, terms and conditions.

C. Key FCC Interpretations of the Telecommunications Act's Access Requirements

The FCC first construed the new access provisions of the Telecommunications Act in its *First Report and Order* implementing the “interconnection” obligations of local exchange telephone carriers.⁸ In that document, the FCC aggressively resolved virtually all questions of interpretation in favor of access.

Among other things, the FCC found that even if a covered electric utility had uniformly denied all outsiders access to its facilities for any purpose, it would now have to make *all* of its facilities available for pole attachments by cable systems and telecommunications carriers if it used *any* of its facilities for wire communications, including internal wire communications used *solely* for the provision of electric service.⁹ Since almost every utility has at least some communications wires on some of its poles, the practical implication of this interpretation is that essentially all investor-owned utilities are required to provide access to all of their poles, even those not currently being used for wire communications of any kind.

1. Rules of General Applicability

Given the many potential fact situations that utilities and attachers may face, the FCC did not attempt to adopt comprehensive access rules. Instead, it set forth five principles of general applicability:

- a. Recognized Industry Standards: In evaluating a request for access, a utility may continue to rely on such recognized industry standards as the National Electric Safety Code to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. Other industry codes will be presumed to be reasonable if shown to be widely accepted objective guidelines for the installation and maintenance of electrical and communications facilities.
- b. Federal Requirements: Federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities;

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, released August 8, 1996 (“*Interconnection Order*”).

⁹ In a subsequent decision the FCC concluded that while the mandatory access provision is triggered by the use of the utility’s facilities for any *wire* communications, the access itself is not limited to wire-based telecommunications providers. Instead, because the Act states that a utility shall provide “*any telecommunications carrier with nondiscriminatory access*,” the FCC has determined that wireless providers such as cellular, PCS and wireless local loop providers, are entitled to nondiscriminatory access to utility poles, ducts, conduits and rights of way. *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, FCC 98-20 (rel. February 6, 1998) (“*Pole Attachment Rate Order*”). This decision was upheld by the U.S. Supreme Court in *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

- c. State and Local Requirements: The Commission will consider state and local requirements affecting pole attachments, and will give these requirements deference even if a state has not sought to preempt federal regulation of pole attachments. State and local requirements will be presumed reasonable unless a complainant can show a direct conflict with federal policy.
- d. Non-Discrimination Among Third-Party Attachees: Where access is mandated, the rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. The utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the formula the FCC has devised for such use.
- e. No Preference for Utility Telecom/Cable Attachments: A utility may not favor itself over other parties with respect to its own attachments for the provision of telecommunications or video programming services.

2. Guidelines for Negotiating and Resolving Access Disputes

The FCC also adopted a number of "guidelines" and presumptions which it expects utilities subject to § 224 to follow in negotiating pole attachment agreements.

- a. Capacity expansion. Believing that a utility can and will expand capacity when it needs to do so for its own purposes, the Commission had concluded that the nondiscriminatory access requirements of Section 224(f)(1) require a utility to expand capacity upon request by other telecommunications carriers and cable operators. The U.S. Court of Appeals for the 11th circuit, however, rejected the FCC's interpretation of the law. In *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir.), the court concluded that the FCC's interpretation is inconsistent with the plain language of the Act's statutory exemption from the requirement to grant access in instances where there is insufficient capacity. Accordingly, a utility need not expand capacity in order to accommodate a request for attachment if the utility would not otherwise undertake such expansion for its own purposes.
- b. Reservation of space. The FCC will permit an electric utility to reserve space on a pole for its own use *if* such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of *the utility's core electric service, and not in the provision of telecommunications service*. The utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility must give the displaced cable operator or telecommunications

carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.

- c. Worker qualifications. A utility may require that individuals who will work 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 can use any individual workers who meet these criteria.
- d. Transmission facilities. In *Southern Company*, the 11th Circuit reversed the FCC's application of the pole attachment rules to interstate transmission facilities and held that only structures that are solely or partially used for distribution of electricity are covered by the Act's definition of a "pole." The FCC will, however, continue to apply the federal pole attachment regulations to transmission facilities that are used in part for distribution. To the extent safety and reliability concerns are greater at an electric transmission facility, the FCC will permit a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.
- e. The FCC has concluded that § 224(f)(1) does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's facilities. It only requires utilities to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.
- f. The Act does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated. The Commission presumes, however, that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent -- capacity, safety, reliability, and engineering principles. The question of access should be decided based on those factors.

3. Modifications to the pole

With respect to attachments requiring modifications to the utility pole, the Commission has adopted the following standards:

- a. Absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. If the contemplated modification involves an emergency situation for which advanced written notice would prove

impractical, the notice requirement does not apply. In these circumstances, the notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. The burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit;

- b. To the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party. Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification;
- c. If an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost;
- d. If a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. An attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost;
- e. A modifying party or parties can recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification;
- f. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis;
- g. In some cases a facility modification may create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification. The owner would not, however, have to use those revenues to compensate the parties that paid for the modification.

4. Resolving Disputes

The FCC has adopted the following procedures for resolving disputes between the parties about Pole attachments:

- a. If a utility wishes to deny a written request for access, it must furnish the requester a written denial by the 45th day. The denial must include all relevant information and explain the reasons for the denial in detail. Under the Section 224 complaint process, the requester will then have 30 days to file a complaint with the Commission. Copies must be served on the utility and the relevant federal, state and local agencies;
- b. The complaining party must establish a prima facie case that the denial was unlawful. The Commission will deny the petitioner's claim if a prima facie case is not established. A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case;
- c. A utility that receives a legitimate inquiry regarding access to its facilities or property must make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information. The Commission therefore believes that its procedures will eliminate the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials;
- d. If the complaining party makes a prima facie case, the burden shifts to the utility to prove that the denial was appropriate under the exceptions to access specified in § 224(f)(2).

II. POLE ATTACHMENT RATES

As discussed above, the federal pole attachment regulations, as amended by the Telecommunications Act of 1996, establish two separate rate formulas. The first formula, which yields the “cable rate,” applies to cable systems that solely provide cable services. The second formula, which yields the “telecommunications rate,” is a new methodology for calculating rates for attachments that are utilized for the provision of telecommunications services. Both formulas involve a series of calculations addressing the net cost of a bare pole,¹⁰ carrying charge components (including administrative, maintenance, depreciation, taxes and cost of capital), and a usage ratio.

¹⁰ “Net cost of a bare pole” is calculated by subtracting from the Federal Energy Regulatory Commission’s Account 364 (“gross pole investment”) the “Depreciation Reserve” for poles and the “Accumulated Deferred Income Taxes” attributable to poles. This figure, called the “Net Pole Investment,” is further reduced by 15% to account for the electric utilities’ costs of cross-

A. Elements of Formulas

1. Use of actual costs

The FCC requires utilities to use actual costs reflected in their regulatory accounts in performing the calculations required by the FCC's formulas. Several electric utilities had urged the FCC to adopt a replacement-cost approach. The utilities noted that the use of historical costs does not reflect the true value of utility infrastructure, particularly with respect to conduit; that replacement costs are typically used to determine costs in resolving "just compensation" claims for the taking of property under the Fifth Amendment to the U.S. Constitution; and that the FCC itself uses replacement costs – denominated as "forward looking costs" – to establish the rates that incumbent local telephone companies can charge competitive local exchange carriers for access to their unbundled network elements.

In its *Order on Reconsideration*,¹¹ the FCC rejected the use of replacement costs and reaffirmed its historical approach. The FCC indicated that the continued use of historical costs accomplishes key statutory objectives of assuring just and reasonable rates for pole attachments while at the same time adding certainty and clarity to negotiations. Furthermore, the FCC rebuffed the suggestion that the agency should strive for consistency between its pole attachment and interconnection policies. According to the FCC, its rules on local competition interconnection agreements utilize forward-looking economic costs because this is the best approach to effectuate the objectives of the 1996 Act "These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about whether or how to enter a local telecommunications market." In this context, the FCC had found the use of a forward-looking cost methodology particularly important, because firms typically compare forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.

In contrast, the FCC observed that cable attachers frequently do not have a realistic option of installing their own poles or conduits because attachers are in many cases foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles. Thus, attachers frequently do not face a realistic "make or buy" decision, and the benefits of giving proper cost signals to new entrants are less pronounced in the pole attachment context, and therefore historical costs are acceptable. Finally, the FCC concluded that the continued use of the historical cost-based pole attachment formula brings certainty to the regulatory process and that "switching to a methodology based on forward-looking economic costs would significantly change and burden the Commission's processes, requiring the Commission to develop a new formula, which would necessitate a protracted rulemaking proceeding involving complicated pricing investigations."

The FCC's rationale in rejecting a replacement cost methodology is instructive for public power utilities that are attempting to fend off or at least mitigate potential state legislation imposing pole attachment requirements. If public power utilities wish to use replacement costs, they should be well

arms, which are not used by communications attachers, and is finally divided by the number of poles owned by the utility.

¹¹ *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Consolidated Order on Partial Reconsideration*, CS Docket No. 97-151, released May 25, 2001.

armed with information on both historical and replacement costs for poles and conduit; should be versed in the arguments that utilities made before the FCC (and will now be making before the courts); and should be aware of state or city restrictions on cable or telephone companies installing their own poles or conduit.

2. Net vs. Gross Cost Data

The FCC's pole attachment formulas rely on the investment and expense data that covered utilities (i.e., investor-owned utilities) maintain in, or derive from, their accounting records. For electric utilities, the FCC relies on data contained in FERC account Form 1. The investment data take two forms: "gross" data, which provide the original cost of the plant being considered, and "net" data, which adjust the gross data to reflect accumulated depreciation and deferred income taxes associated with that plant. The pole attachment formulas generally allocate the costs of owning and maintaining poles on the basis of net pole or net plant investment.¹² In the *Order on Reconsideration*, the FCC affirmed its decision to continue the practice of calculating pole attachment rates using net book costs, but the agency indicated that it would allow the use of gross book costs if all parties agreed to that usage. At the same time, the FCC acknowledged that an important goal is to ensure that like figures are used, whether net or gross.

The FCC's treatment of net v. gross data appears to soften somewhat the agency's stance on utilizing gross cost data. Public power utilities that would like to take advantage of the FCC's new positions should ensure that, whatever methodology they choose, they meet the goal of consistency. Also, public power utilities that do not maintain FERC accounts should follow generally applicable accounting standards or applicable state requirements.

B. Cable Television Formula

The formula that the FCC has developed under Section 224(d) yields the "cable rate" that has been in effect for nearly two decades for attachments by cable operators. As of February 8, 2001, only cable television operators that are solely providing "cable services" are entitled to rely on the FCC's lower cable formula.¹³

¹² The FCC defines net pole investment as the gross investment in poles less accumulated depreciation and accumulated deferred income taxes with respect to pole investment. Net plant investment is defined as the gross plant in service less accumulated depreciation and accumulated deferred income taxes with respect to plant in service.

¹³ The FCC has concluded that cable operators providing commingled Internet and traditional cable services are still entitled to the "cable only" pole attachment rate formula. This determination was upheld by the Supreme Court in its *Gulf Power* decision. *National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

Between 1978 and 1996, the FCC construed Section 224(d) on numerous occasions.¹⁴ Among the most important of its determinations were (1) its adoption of a maximum-rate formula that allocated recoverable costs among attaching entities according to their respective shares of the total usable space,¹⁵ and (2) its decision to deem cable operators to be occupying no more than one linear foot of usable space.¹⁶ Since poles typically have more than 13 feet of usable space, most of which is not physically occupied, the combined effect of these FCC determinations was to require host utilities to bear a heavily disproportionate share of total costs.¹⁷ In its 2001 *Order on Reconsideration*, the FCC reaffirmed its cable rate formula and refused to alter the presumptions on which it has historically relied in applying the formula. Thus, the FCC's cable rate formula is calculated as follows:

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

The FCC presumes that average pole height is 37.5 feet, that the average amount of usable space is 13.5 feet, and that a cable attachment occupies one vertical foot of the usable space. The FCC treats the 40-inch "neutral zone" or "safety space" that separates the electric space from the communications space as usable space attributable to the electric utility – even though it exists solely for the safety of users of the communications space. As a result, the cable rate formula continues to subsidize cable operators, even they are no longer in their "fledgling" stage. Indeed, despite recent high profile bankruptcies, many cable operators are in a much stronger position today than their host utilities, many of which face the restructuring of the electric industry and must take maximum advantage of every opportunity to recover their costs fully.

C. The "Telecommunications" Rate Formula

The new "telecommunications rate" is comprised of two elements: a charge for the usable space occupied by the attaching entity and a charge for the common space on the pole that benefits all users. The "telecommunications rate" maintains all of the FCC's applicable assumptions of the cable rate for the calculation of the "usable space" component of the formula. The component for allocating common space then adds a common space allocation that is derived by apportioning 2/3 of the cost of "common space" equally among all attaching entities. "Common space," referred to in the federal rules as "other than usable space," consists of space that is not used for the placement of wires or cables but which jointly benefits all users by supporting the underlying structure, and consists of the portion of the pole

¹⁴ *First Report and Order* (Adoption of Rules for the Regulation of Cable Television Pole Attachments), CC Docket No. 78-144, 68 FCC 2d 1585 (1978); *Second Report and Order*, 72 FCC 2d 59 (1979); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); *Report and Order*, CC Docket No. 86-212 (Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles), 2 FCC Rcd 4387, 4387-4407 (1987) ("*Amendment of Rules and Policies Order*"), *recon. denied*, 4 FCC Rcd 468 (1989).

¹⁵ *Amendment of Rules and Policies Order*, 2 FCC Rcd at 4403-4407.

¹⁶ *Third Report and Order*, 77 FCC 2d at 188-91.

¹⁷ For example, if a pole with 13 feet of usable space had two attachers, the host utility and a cable operator, the cable operator would pay only 1/13 of the total recoverable costs and the host would pay 12/13.

beneath ground level up to the lowest place on the pole at which a telecommunications circuit may be attached.

The “telecommunications rate” can be represented algebraically as follows:

$$\text{Maximum Rate} = \text{Assignable Space Factor} + \text{Common Space Factor}$$

$$\text{Usable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Assignable Space}} \times \frac{\text{Assignable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge}$$

$$\text{Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Common Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge}$$

The new “telecommunications rate” went into effect on February 8, 2001, the rate increases that it justifies are to be phased in under equal increments of twenty percent over a period of five years.

1. Counting attaching entities

The “telecommunications rate formula” separates the costs of unusable space from the costs of usable space and allocates 2/3 of the costs of the unusable space evenly among all attaching entities that provide telecommunications service. Accordingly, the determination of who is an attaching entity is a significant factor in determining the maximum rate. Initially the FCC concluded that, for the purposes of allocating costs of unusable space, the parties to a pole attachment agreement should only count providers of cable or telecommunications services. Under this approach, an electric utility that did not provide cable or telecommunications services would not count its own attachments. Thus, on poles with three attachers, including the utility, the utility would pay 1/3 of the costs and the other attachers would pay 2/3 of the costs of the unusable space.

In its *Order on Reconsideration*, however, the FCC significantly revised its earlier interpretation of “attaching entities.” The FCC has now concluded that all utilities should be counted as attaching entities, irrespective of whether their attachments are being utilized for any communications purposes.

In

addition, the FCC has further clarified that any entity with a physical attachment to the pole should be counted as an attaching entity, including any government entity that has physical attachments to a pole other than temporary or seasonal attachments. The FCC's determination was upheld in *Southern Co. Services, Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

Clearly, the FCC has dramatically departed from its earlier interpretation of what constitutes an attaching entity, the effect of which will result in a significantly lower pole attachment rate for any utility that follows the FCC’s formula. The new rate calculation also has the potential of making the attachment rates of public power utilities that do not follow the FCC’s methodology seem to be much higher in comparison the rates of pole owners that apply the FCC’s new interpretation.

The FCC’s new interpretation also underscores the arbitrary nature of the Act’s allocation of 1/3 of the unusable space to the utility, since it will *start with* 1/3 of costs of the unusable space and then have to pay an *additional* share as an “attaching entity.” For public power utilities that are not bound by the FCC’s interpretations, this reinforces the incentive not to use the FCC’s 1/3-2/3 approach but to allocate *all* of the unusable space on a “per capita” basis approach for the allocation of the unusable

space. A per capita approach would require the utility to be counted as an “attaching entity” whether or not it is a provider of cable or telecommunications services, and the utility would be attributed a percentage of the unusable space equal to that of any other attacher.

a. Presumptive average number of attaching entities

The FCC determined that each utility should develop its own average number of attaching entities. At the same time, to bring a measure of uniformity to such averages, the FCC required utilities to establish averages based on “rural,” “urban,” or “urbanized” service areas, as defined by the Bureau of Census, United States Department of Commerce (“Bureau of Census”). In order to expedite the process of developing average numbers of attaching entities and to allow utilities to avoid the expense of developing location-specific averages, the FCC developed two rebuttable presumptive averages for use in the telecommunications formula. Specifically, the FCC will now presume that in non-urbanized areas (population less than 50,000) the average number of attachers is three (3) attaching entities. This is based on the FCC’s expectation that on any given pole or portion of conduit, there would be electric, telephone and cable attachers. For urbanized areas (50,000 or higher population), the FCC will presume that the average number of attachers is five (5). This reflects the FCC’s expectation of attachments by electric, telephone, cable, competitive telecommunications service providers and governmental agencies. The FCC has indicated that any party may rebut these presumptions with a statistically valid survey or actual data.

The FCC will allow utilities the option of using the above presumptive averages, or developing averages for two areas: (1) urbanized (50,000 or higher population), and (2) non-urbanized (less than 50,000 population). The FCC prefers that each utility use the data it has available in its corporate and regulatory records, and that it not go to extraordinary lengths to be precise when reasonable estimates will generally provide an equitable process. If a utility exercises good faith in determining average numbers of attaching entities upon which to base the costs of providing unusable space, the burden of proof will be on an attaching entity to demonstrate the costs are being unjustly apportioned. In demonstrating its good faith, a utility that develops its own averages will have to make its data, information and methodology available to the attaching entity. The FCC has further indicated that the costs of determining the average numbers of attaching entities shall not be directly passed on to the attaching entities as make-ready costs. Instead, the FCC suggests that any such costs be treated as a business expense reported to the utility’s appropriate regulatory accounts and factored into the carrying charge rate of the pole attachment formula.

2. Overlapping

In its *Order on Reconsideration*, the FCC concluded that overlapping of an existing, authorized attachment, by either the owner of the underlying attachment or a third-party, does not constitute a separate attachment for the purposes of allocating the costs of either usable or unusable space. The Commission assumes that any additional burdens on the pole can be handled through standard engineering practices. The Commission will not require an overlasher to obtain a separate agreement with the utility. The Commission also determined that there are no additional costs to the pole owner caused by overlapping, such as increased loading, that are properly recoverable.

Public power utilities that are not bound by the FCC’s position should consider requiring that third party overlashers obtain their consent and to pay reasonable compensation. At the very least, agreements among the utility, the host attacher and third-party overlasher are necessary to clarify the

rights and liabilities of the respective parties in the event of accidents, bad weather, etc. Further, the pole attachment agreement with the underlying host attacher should restrict overlashing by third-parties absent the utility's written concurrence.

3. Dark fiber

A third party leasing dark fiber capacity (i.e., fiber without the associated electrons) from a cable service provider will not be required to make any payment to the pole owner separate from the payment of the host attaching entity. If, however, an attachment previously used for providing solely cable service would, as a result of leasing of dark fiber, also be used to provide telecommunications services, the rate for attachment will be determined under the rate for provision of telecommunications services.

4. Conduits

While Section 224 of the Pole Attachment Act has always applied to utility-owned ducts and conduits, the FCC had not established a formula for such rates before the Telecommunications Act became law. In large part this was because cable television systems typically attached their cables to poles and rarely used underground ducts and conduits. But with the increase in telecommunications competitors and the desire of many local governments to encourage underground wiring, particularly in urban markets, there has been a sharp increase in the number of entities seeking access to utility ducts and conduits.

The Commission essentially adopted the same methodology for ducts and conduits as it utilizes for poles, except that it changed some of the presumptions. Each entity that installs one or more wires in a duct or duct bank will be counted as a separate attaching entity for purposes of allocating unusable conduit space, regardless of the number of cables installed or the amount of space occupied. The Commission initially concluded that unusable conduit space would include conduit space reserved for maintenance and emergency circumstances and not generally used, and costs for construction of conduit system. In its *Order on Reconsideration*, the FCC concluded that there is no unusable conduit space and therefore essentially applies the conduit rate applicable to cable operators to telecommunications providers.

With respect to the allocation of the usable space component, the FCC adopted a controversial presumption that each cable or telecommunications attacher occupies a ½ duct of space. The FCC based this decision on its conclusion that telecommunications carriers increasingly utilize inner duct which allows for multiple attachments within a single duct. In adopting this presumption, the FCC ignored arguments by the utility industry that electric cables and telecommunications cables cannot generally occupy the same duct, and that therefore the use of a utility's duct for a telecommunications attachment effectively precludes the use of that duct by the utility for electric purposes.

4. Rights of Way

Because there have been relatively few “pole attachment” complaints involving access to underlying utility rights of way, and because rights of way are largely governed by state and local law, the FCC initially declined to provide standards to govern rates for rights of way. Rather, the FCC indicated that it would consider rights of way issues and develop guidelines on a case-by-case basis.¹⁸ In

¹⁸ *Pole Attachment Rate Order*, ¶¶ 120-21.

Cable Television Association of Georgia v. Georgia Power, the FCC held that a utility is not entitled to any additional compensation beyond the rate formula for a cable operator's use of a private utility easement.

5. Wireless attachments

The FCC had previously held that the federal pole attachment requirements in 47 U.S.C. § 224 apply to wireless attachments by cable systems and telecommunications carriers, and the Supreme Court has affirmed this determination in *Gulf Power*.

In *Omnipoint v. PECO*, the FCC released an order requiring PECO Energy, an investor-owned electric utility, to allow Omnipoint a PCS provider to make wireless attachments to PECO's utility poles and other distribution facilities. *PECO* is the first FCC decision to implement its wireless access holdings. In its *PECO* Order, the FCC held that Omnipoint has the right to make wireless attachments to PECO's poles and distribution facilities at just and reasonable rates. The FCC has never given specific guidance on how the federal pole attachment rate formulas should be applied to wireless attachments, and it made no attempt to do so in its *PECO* decision. Rather, the FCC directed PECO to provide Omnipoint the relevant historical cost data for the facilities to which Omnipoint still seeks attachments, and it ordered the parties to negotiate just and reasonable rates based upon this cost data. If the parties cannot reach an agreement and Omnipoint believes that PECO's new proposed rates are unlawful, Omnipoint can seek further relief from the FCC.

6. Administrative Burdens

The FCC has struck down a number of contractual provisions that it considers to be administratively burdensome and that would result in excessive costs to the attaching entity. Among these are: "unauthorized attachment penalties" that are not tied to costs; requirements to pay make-ready costs in advance; costs related to engineering and lawyers that should be included in the rate base; and non-reciprocal indemnification clauses.

III. OPTIONS FOR MUNICIPAL ENTITIES

Unless state law requires a different result, the Municipal Exemption gives municipal entities the opportunity to reject any or all federal access, rate and procedural requirements and interpretations – municipal entities need only avoid erecting unreasonable barriers to entry and act in a competitively neutral and non-discriminatory manner.¹⁹ For example, they need not expand capacity to accommodate requests for pole attachments, offer cable providers a subsidized rate, limit their rates to the levels prescribed by the FCC's formulas, defer rate increases until February 8, 2001, or to phase in increases over a five-year period. They need not respond to pole attachment requests in the manner prescribed by the FCC, and they are not subject to the deadlines that the FCC imposes on covered utilities (although undue delay could amount to a barrier to entry). In short, the Municipal Exemption allows municipal

¹⁹ Competitively neutral and non-discriminatory does not mean equal, as municipalities may charge different rates to persons in different circumstances. *AT&T Communications of the Southwest, Inc. v. City of Dallas, TX*, 8 F. Supp. 582, 593-94 (N.D. Tex. 1998), citing Barton-Stupak amendment to Section 253(c) and comments of Rep. Stupak, 141 Cong. Rec. H8425-27 (daily ed., Aug. 4, 1995); *accord TCG Detroit v. City of Dearborn, MI*, 16 F. Supp. 2d 785, 793 (E.D. Mich. 1998).

entities to seize the “high ground” and do what they believe to be reasonable, fair, administratively workable and free of the political compromises reflected in Section 224 and the FCC’s implementing requirements and policies.

A valuable precedent supporting the points set forth above is *TCI Cablevision of Washington v. City of Seattle*, No. 97-2-02395-5SEA (Super. Ct. of the State of Washington for King County, May 20, 1998) (appeal dismissed). In that case, the court upheld the pole attachment rates established by City Light of Seattle, even though City Light did not follow the FCC’s formulas, treated cable and telecommunications providers alike, rejected the FCC’s interpretations (including its approach of allocating the “communications” or “safety” space solely to the electric utility) and increased rates fully and immediately. This case should be essential reading for municipal entities developing new pole attachment agreements.

IV. INNOVATIVE AND COST-EFFECTIVE MODEL AGREEMENTS

Developing new pole attachment agreements is a highly complex undertaking that requires specialized legal, engineering and accounting expertise of a kind that few municipal entities have in house. Moreover, many municipal entities that serve small communities have too little revenue potential from pole attachments to justify hiring their own team of outside experts.²⁰ In recognition of these realities, the municipal electric associations in at least five states -- Illinois, Iowa, Texas, Virginia and Wisconsin -- have facilitated joint efforts by their members to develop model pole attachment license agreements and instructions on how to use them. This approach provides participants the level of expertise that they cannot afford individually, increases the amount of relevant information available to all participants, promotes consistency, and enhances the ability of individual members to resist challenges from industry.²¹

For the benefit of participants that prefer to avoid controversy, the models generally reflect conservative assumptions about federal and state-specific requirements. Recognizing that some participants may have sufficient revenue potential to consider alternative interpretations, the instructions also explain opposing arguments, risks and benefits of more aggressive stances, particularly on issues that have recently been are currently the subject of open agency proceedings, requests for reconsideration or litigation.

The model agreements are structured so that they serve as “master” license agreements that establish the general terms and conditions governing an outside party’s attachment of communications wires, cables and other facilities to a municipal entity’s poles, ducts and conduits. To provide flexibility

²⁰ This is not to say that revenue potential is the sole reason for developing new pole attachment agreements. For example, some municipal entities may wish to develop and lease access to a system of underground conduit primarily to avoid repeated street cuts and environmental disruption by successive communications entrants. For such municipal entities, the costs of developing state-of-the-art agreements may be justifiable as part of the overall project.

²¹ In *Continental Cablevision of Ohio v. American Electric Power Co.*, 715 F.2d 1115, 1120-21 (6th Cir. 1983), the court held, among other things, that investor-owned electric utilities and their trade associations do not violate antitrust laws when they exchange information about pole attachment fees, as they do not compete in the provision of pole attachments. For government entities, the chance of violating antitrust laws by exchanging information about pole attachment fees is all the more remote because this information is generally in the public domain.

to make periodic adjustments and accommodate new developments, specific rates and engineering issues are addressed in addenda. Permission to make attachments to particular facilities is handled pursuant to a permit process, through procedures and forms to which the master agreements allude.

The development of model agreements involves dozens of interpretative and policy decisions involving both federal and state law, and there are significant variations among the participants. It is therefore important to have a committed, knowledgeable, representative and multi-disciplinary steering committee to work with the consultants. Participants should also expect the process to take several months.

If a municipal entity wishes to explore the possibility of undertaking joint efforts to develop pole attachment agreements, it should consult its state municipal electric association or municipal league, the American Public Power Association or the authors.