

ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF A RULEMAKING)	
PROCEEDING TO CONSIDER CHANGES TO)	DOCKET NO. 15-019-R
THE ARKANSAS PUBLIC SERVICE)	ORDER NO. 5
COMMISSION’S POLE ATTACHMENT RULES)	

ORDER

On March 20, 2015, by Order No. 1 in this docket, the Arkansas Public Service Commission (Commission) initiated this rulemaking proceeding to consider whether, under Ark. Code Ann. §§ 23-4-1001 *et seq.*, in furtherance of its jurisdiction and its mandate from the Arkansas General Assembly, a modification of the Commission’s existing Pole Attachment Rules (PARs) would be just, reasonable, and in the public interest. The Commission directed the General Staff (Staff) of the Commission to file proposed amendments to the PARs, along with written comments, by May 21, 2015. By this Order, the Commission adopts modifications to the PARs.

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1. Procedural History

Order No. 1 in this Docket set forth the background of the Commission's regulation of pole attachments¹ and established this docket to consider modification of the existing PARs, including but not limited to the following issues:

- a. Rates, terms and conditions for pole attachments that are fair and reasonable to all parties and their respective customers, including consideration of formula rates based in whole or in part on other existing federal or state formula rates;
- b. Technical standards for pole attachments that maintain the reliability of public utilities and meet safety codes and other similar considerations related to public safety;
- c. Terms regarding pole replacement, maintenance, reclamation of space and rearrangement; and
- d. Notice requirements that should apply to affected parties.

The AG filed its notice of intent to be an active party, and Entergy Arkansas, Inc. (EAI), Southwestern Electric Power Company (SWEPCO), Oklahoma Gas and Electric Company (OG&E), and Empire District Electric Company (Empire) filed notices of intent to participate as official intervenors. Likewise, Arkansas Electric Cooperative Corporation (AECC) and the state's 17 jurisdictional electric cooperatives,² filed a notice of intent to participate.

¹ Ark. Code Ann. § 23-4-1001 defines "Pole attachment" as the attachment of wires and related equipment to a pole, duct, or conduit owned or controlled by a public utility for the provision of (i) Electric service; (ii) Telecommunication service (iii) Cable television service; (iv) Internet access service; or (v) Other related information services.

² Arkansas Valley Electric Cooperative Corporation, Ashley-Chicot Electric Cooperative, Inc., C& L Electric Cooperative Corporation, Carroll Electric Cooperative Corporation, Clay County Electric Cooperative Corporation, Craighead Electric Cooperative Corporation, Farmers Electric Cooperative Corporation, First Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc., North Arkansas Electric Cooperative, Inc., Ouachita Electric Cooperative Corporation, Ozarks Electric Cooperative Corporation, Petit Jean Electric Cooperative Corporation, Rich Mountain Electric Cooperative, Inc., South Central Arkansas Electric Cooperative, Inc., Southwest Arkansas Electric Cooperative Corporation, and Woodruff Electric Cooperative Corporation (collectively, the Member Cooperatives).

Also filing notices of intent to participate were the Arkansas Cable Telecommunications Association, certificated competitive and incumbent local exchange carriers,³ and Sprint Communications Company, LP (Sprint). CTIA—the Wireless Association (CTIA), PCIA – The Wireless Infrastructure Association (PCIA), and Sprint Communications Company, LP (Sprint) were granted intervention by the Commission.

On May 21, 2015 (as amended by *errata* on May 26 and May 29, 2015), Staff filed *Initial Comments and Proposed Amendments to the Pole Attachment Rules* (Proposed PARs). On June 12, 2015, Staff requested an extension of the deadline for filing Reply Comments from June 22, 2015, to July 22, 2015 and proposed for adoption a prospective procedural schedule. On June 19, 2015, by Order No. 3, the Commission adopted a procedural schedule calling for Reply Comments to be filed no later than July 22, 2015, and Second Reply Comments to be filed no later than August 19, 2015. The Commission scheduled a public evidentiary hearing for October 27, 2015.

Between July 16 and July 22, 2015, the following parties submitted Reply Comments: OG&E, EAI, AECC and the Member Cooperatives, Carroll Electric Cooperative Corporation (CECC), PCIA, CTIA, Craighead Electric Cooperative Corporation, and SWEPCO. On July 22, 2015, ACTA, CenturyLink, E. Ritter Communications, Inc., MCImetro Access Transmission Services, LLC, Rice Belt Telephone company, Inc., South Arkansas Telephone Company, Southwestern Bell

³ CenturyLink Communications, LLC, CenturyTel of Arkansas, Inc., CenturyTel of Central Arkansas, LLC, CenturyTel of Missouri, LLC, CenturyTel of Mountain Home, Inc., CenturyTel of Northwest Arkansas, Inc., CenturyTel of Northwest Louisiana, Inc., CenturyTel of Redfield, Inc., CenturyTel of South Arkansas (collectively CenturyLink), E. Ritter Communications, Inc., MCImetro Access Transmission Services, Inc., Rice Belt Telephone Company, Inc., South Arkansas Telephone Company, Inc., Southwestern Bell Telephone Company, Windstream Arkansas, LLC, and Yelcot Telephone Company.

Telephone Company, Windstream Arkansas, LLC, and Yelcot Telephone Company (collectively Joint Commenters) filed Reply Comments.

On August 19, 2015, Staff filed its Reply Comments and proposed amendments to the PARs in black-lined and clean versions and as modified in response to the Initial Comments of the parties. Also on August 19, 2015, the following parties filed Second Reply Comments and Exhibits: AECC and the Member Cooperatives, SWEPCO, PCIA, CTIA, and the Joint Commenters.

On October 27, 2015, the Commission held a public evidentiary hearing. The Commission received one public comment online. Subsequent to the public hearing, on November 4, 2015, CTIA submitted a request for the Commission to take administrative notice of purportedly relevant recent actions taken by the Washington Utility and Transportation Commission and the California Public Utility Commission. On December 1, 2015, the Joint Commenters requested that the Commission take administrative notice of purportedly relevant recent action taken by the Federal Communications Commission (FCC). On April 27, 2016, the Joint Commenters requested that the Commission take administrative notice of a recent announcement by Ozarks Electric Cooperative Corporation (Ozarks) of the creation of OzarksGo, LLC, ("OzarksGo"), Ozarks' 100% owned telecommunications subsidiary that will offer all-fiber high-speed internet, television, and telephone services to subscribers in northwest Arkansas and northeast Oklahoma.

2. General Comments of the Parties

Staff's Initial Comments

In Initial Comments filed in response to Order No. 1, Staff states that the Arkansas General Assembly enacted Act 740 of 2007 (Act or Act 740) entitled *An Act to Vest the Arkansas Public Service Commission with Jurisdiction Over Pole Attachment Agreements and Disputes Among Utilities Regarding Pole Attachments; and for Other Purposes* (codified at Ark. Code Ann. §§ 23-4-1001 through 23-4-1006) giving the Commission jurisdiction over Pole Attachment agreements and disputes. The Act required the Commission to “develop rules necessary for the effective regulation of the rates, terms, and conditions upon which a public utility shall provide access for a Pole Attachment.” *See*, Ark. Code Ann. § 23-4-1003(b)(1). The Commission was also authorized to adopt procedures necessary to hear and to resolve complaints arising from disputes identified in Ark. Code Ann. § 23-4-1004(a)(1) through (3). After notice and a hearing, the first version of the PARs became effective July 30, 2008. Staff Initial Comments at 1.

As part of the development of its proposed amendments to the PARs, Staff held a collaborative workshop on April 30, 2015. Staff states that its proposed PARs balance the interests of the consumers of public utility services offered by Pole Owners and subscribers of services offered by Attaching Entities. Staff maintains its position from the previous Pole Attachment rulemaking, that the PARs “cannot and should not define every aspect of the relationship between the public utility Pole Owner and the Attaching Entities.” Staff states that its proposed PARs incorporate the terms and conditions upon which a Pole Owner will provide nondiscriminatory access to poles, while maintaining

the safety and reliability of public utility services. Staff states that the PARs encourage voluntarily negotiated agreements. Staff Initial Comments at 2-3. Staff asserts that the proposed PARs are reasonable and in compliance with Ark. Code Ann. §§ 23-4-1001 *et seq.* Staff recommends that, upon adoption of the proposed PARs, the Commission reaffirm to the FCC that the Commission “regulates the rates, terms, and conditions of access for Pole Attachments.” Staff Initial Comments at 4.

EAI Reply Comments

EAI commends Staff on its efforts to work with the parties on an informal basis in both this docket and Docket No. 08-073-R to develop Staff’s proposed PARs. EAI states that Staff clearly considered the reliability of public utility services and compliance with safety standards. EAI’s primary goal is the safety of its employees, the Attaching Entities’ employees, and the general public. EAI agrees that the proposed PARs reflect Staff’s efforts to reasonably balance the interests of both the consumers of public utility services and the subscribers of services offered by Attaching Entities. EAI’s limited comments focus on safety and reliability. EAI Reply Comments at 1-2. EAI also proposes to include *Force Majeure* language be included in the proposed PARs and provides suggested language. EAI Reply Comments at 6.⁴

OG&E Reply Comments

OG&E states it appreciates the opportunity to comment on the proposed PARs and the work and effort of Staff, noting that its comments are minimal, focusing on safety responsibilities and supporting the purpose of strengthening the preference for voluntarily negotiated agreements. OG&E Reply Comments at 1.

⁴ The Commission notes that EAI incorrectly styled its Reply Comments as “Initial Comments.”

AECC Reply Comments

AECC commends Staff on its efforts to work with all the parties on an informal basis in this docket. Although AECC generally supports Staff's proposed Rules, there is additional refinement needed regarding the rate formula and safety and reliability matters. AECC Reply Comments at 4. AECC included Reply Exhibit AECC-1, which is a redlined version of its suggested changes to Staff's proposed rules. *Id.* at 29 and 37.

CECC Reply Comments

CECC incorporates the comments of AECC. CECC Reply Comments at 1. CECC also contends that Staff's proposed rules on Pole Attachment rates would force CECC to permit the use of its poles without requiring the Attaching Entities to pay the cost of the pole or otherwise adequately compensate CECC, thereby violating the prohibition on takings under Article 2, §22 of the Arkansas Constitution and the 5th Amendment to the United States Constitution. *Id.* at 1-3. Referencing a standard in Arkansas case law, CECC argues that the proposal would constitute a "taking or inverse condemnation" because CECC would no longer have exclusive control over its property. *Id.* at 3-4.

CECC states, in addition, that Attaching Entities have, on previous occasions, damaged CECC's poles, resulting in safety hazards. CECC states that it must be adequately compensated for the additional costs incurred due to safety violations. *Id.* at 3.

CECC states that there are other legal issues regarding the proposed rules, including "whether the rules would result in trespass by Attaching Entities or an ouster of CECC from its property." *Id.* at 4. CECC requests that the Commission adopt the rules proposed by AECC. *Id.* at 4.

SWEPCO Reply Comments

SWEPCO commends Staff for its attention to the concerns of all parties and makes several recommendations for technical changes and adjustments to timeframes contained in the Proposed Rules. SWEPCO Reply Comments at 1-7.

Joint Commenters Reply Comments

Joint Commenters express appreciation for Staff's work to develop proposed rules and efforts to work with the parties on an informal basis. Joint Commenters support the Commission's effort to comprehensively amend the PARs and urge careful consideration of its comments and the report of Economist Patricia D. Kravtin. All of the Joint Commenters are Attaching Entities with some also being Pole Owners. Although the Joint Commenters support many of Staff's proposed rules, they state that some provisions fail to meet the effective regulation standard required by Act 740. Joint Commenters Reply Comments at 5-6.

Joint Commenters provide the following overview of Arkansas Pole Attachment regulation, asserting that it is critical to keep in mind that pole regulation has contributed to deployment of advanced communication systems. *Id.* at 6-7.

According to Joint Commenters, attaching to existing poles and conduit space, which is under the exclusive control of public utilities, is the only practical alternative for cable operators, telecommunications providers, and others. The abuse of that control has been documented by the U.S. Congress, federal courts, and the FCC. As stated by the FCC in its 2011 Pole Attachment Order, Congress granted the FCC the authority to regulate the rates, terms, and conditions of Pole Attachments in recognition of Pole Owners' ability to charge unreasonably high rates as a result of

exclusive control. Act 740 reflects the need for the Commission to address these issues through effective Pole Attachment regulation. *Id.* at 8-9.

Joint Commenters state that Pole Attachment rates must be reasonable in order to encourage broadband deployment and note that Arkansas ranks 48th in the country in the FCC's 2015 Broadband Progress Report. The FCC's National Broadband Plan (Plan) recommends that that Pole Attachment rates be as low and uniform as possible, with the FCC's cable formula as the objective, because they have a major impact on broadband deployment. The FCC's 2011 Pole Attachment Order revised its Pole Attachment regulations "to improve efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout."⁵ This FCC Order revised the FCC's telecom rate formula and made the rates very similar to those produced by the FCC's cable rate formula. Joint Commenters state that the FCC is considering additional changes which include modification of the space factor component in the telecom rate formula to ensure the rates produced are essentially identical to the cable formula regardless of the number of attachers. *Id.* at 9-12.⁶

Joint Commenters state that many of the rules advocated by electric utility Pole Owners during informal discussions seek to establish rates that are excessive and are out of step with most of the country and most of Arkansas' neighboring states (Mississippi, Oklahoma, Tennessee and Texas apply the FCC's telecom and cable

⁵ https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-50A1.pdf § I, ¶ 1.

⁶ The Commission notes that on November 17, 2015, the FCC issued an Order on Reconsideration, In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for Our Future, WC Docket No. 07-245 and GN Docket No. 09-51. Joint Commenters state that in this order the FCC took additional steps to align its telecom rate with its cable rate for Pole Attachments to prevent utility Pole Owners from charging cable TV operators more when they provided broadband and other telecom services.

formulas and Louisiana uses a formula based on the FCC cable formula). In addition, the proposals seek to maintain the status quo regarding terms and conditions that have been rejected by regulators across the country. *Id.* at 12.

Joint Commenters assert that the FCC cable formula is compensatory to Pole Owners and has been found by courts, as well as federal and state agencies, to be just and reasonable and not a subsidy. The majority of the twenty-one certified⁷ states (including the District of Columbia) have adopted the FCC cable formula or a close variation after considering the interests of utility ratepayers. Pole attachment reform alone will not achieve the broadband deployment goals, but it is a meaningful part. *Id.* at 12-13.

Based on their comments, the expert report of Patricia Kravtin, and the redline rules provided, Joint Commenters recommend that the Commission adopt its proposed amendments to Staff's proposed rules. *Id.* at 51.

CTIA Reply Comments

CTIA is an international nonprofit organization that has represented the wireless communications industry since 1984. Members include wireless carriers and their suppliers and providers and manufacturers of wireless data services and products. CTIA Reply Comments at 1.

CTIA supports the re-examination of the PARs, which have the potential to significantly impact broadband deployment in Arkansas. Any changes to the current PARs should "guarantee just, reasonable, non-discriminatory and prompt access to

⁷ The FCC certifies states to regulate Pole Attachments when the legislature of the state has acted to exercise reverse preemption jurisdiction. Act 740 constitutes the Arkansas General Assembly's action enabling FCC certification. See Joint Commenters Reply Comments at 133.

utility poles for all wireless and wireline attachers.” CTIA fully supports and endorses the filings of the Wireline Attachers, including the testimony of Patricia D. Kravtin. CTIA encourages the Commission to consider the role of mobile communications networks in delivering broadband and the need to improve cellular coverage. *Id.* at 1-3.

According to CTIA, the Arkansas legislature, the FCC, and the White House have emphasized the importance of broadband. CTIA states that Arkansas ranked last in broadband use, adoption, and network speed in 2012 and still ranks at or close to the bottom of several broadband measures. CTIA points out that the FCC describes broadband as the “the greatest infrastructure challenge of the early 21st century” and urges regulators to “promote rapid and efficient deployment and not discriminate against wireless providers.” *Id.* at 3-5.

CTIA states that Americans use more than 11.1 billion megabytes of mobile broadband every day and projects a 600% increase by 2019. CTIA indicates that consumers prefer mobile broadband, including a higher percentage of low-income and minority consumers. CTIA notes that 80% of Arkansas consumers use the internet, but only 62% have broadband service in their home. While the wireless industry invested \$32.1 billion in capital in 2014 and has spent over \$340 billion since 1985, CTIA states that, to facilitate broadband deployment in Arkansas, wireless providers must have the “necessary access to existing infrastructure to permit rapid and efficient deployment.” *Id.* at 5-6.

CTIA asserts that wireless attachments on utility poles allow carriers to increase signal strength, improve the quality of service and keep pace with demand for broadband. Two types of wireless attachments on utility poles are Distributed Antenna

Systems (DAS) and small cell networks. CTIA states that the most efficient way to extend these DAS and small cell networks is through use of existing support structures in rights-of-way. Antennas associated with DAS and small cell networks can be installed on the pole top or elsewhere on the pole. CTIA states that utility poles are cost-effective, efficient, dependable, and often have surplus capacity that can be safely adapted for wireless attachments. Pole top attachments have been safely deployed in a number of states and are important because the higher the installation the better the coverage. *Id.* at 6-7.

CTIA asserts that the primary barriers in Arkansas include the cost and reluctance of Pole Owners to allow access for CTIA members' facilities. CTIA states that the FCC has "determined that wireless attachers are to be afforded the same rights and protections on a non-discriminatory basis as other attaching entities." CTIA requests the Commission to adopt similar rules and join other states that have either adopted or are considering rules to promote mobile broadband. *Id.* at 7-8.

CTIA notes that currently, there is not a Pole Attachment rate formula in Arkansas. CTIA states that the lack of a rate formula has resulted in arbitrary terms and conditions and exorbitant rates for providers, making it more expensive to implement DAS and small cell networks in Arkansas than in a great majority of states. In addition, the lack of guidance has generated an unusual volume of Pole Attachment complaints in Arkansas. The FCC's wireless and pole-top access and rate rules apply in Arkansas' neighboring and nearby states (Florida, Georgia, South Carolina, Tennessee, and Texas). Clarification that the Commission's rules apply to wireless will assist in broadband deployment and enhance cellular voice coverage in Arkansas. In addition, it

will allow Arkansas to compete on a level playing field with neighboring states that have been successful in attracting broadband investment (Florida, Georgia, South Carolina, Tennessee, and Texas all rank in the broadband top 30). *Id.* at 8-9.

CTIA asserts that “DAS and small cell network deployments today are at a development state analogous to that of cable television networks in the 1960s and 1970s.” The FCC has recognized that the federal Pole Attachment Act applies to wireless attachments, and the Supreme Court has agreed. The FCC stated that Congress did not distinguish between wireless and wired attachments, and there is no basis for limiting the definition of telecommunications providers to wireline. *Id.* at 9-10.

CTIA notes that the FCC revised its Pole Attachment rules in 2011 “to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.” In 2010, Arkansas certified that it has regulatory authority over Pole Attachments, which pre-empted federal jurisdiction. CTIA argues that “[g]iven the Commission’s authority, it should ensure that wireless attachers are afforded the same rights and protections that are granted to wireless attachers in surrounding states.”

CTIA asserts that access to poles will also promote public safety and, in particular, emergency services. The FCC noted that a large majority of 9-1-1 calls are from wireless devices. By promoting efficient and rapid deployment for wireless attachers, the Commission will create benefits for emergency communications in Arkansas. The Commission should explicitly clarify that its rules apply to wireless and wireless pole-top attachments. *Id.* at 10-11.

CTIA provided a mark-up of suggested changes and generally agrees with the Joint Commenters. The primary modification differences between CTIA and Joint Commenters are noted in the comments for specific rules.

PCIA Reply Comments

PCIA – The Wireless Infrastructure Association represents companies that build, design, own, and manage telecommunications facilities throughout the world. Its members include carriers, infrastructure providers, and professional services firms. HetNet Forum is a membership section of PCIA that is dedicated to the advancement of heterogeneous networks. PCIA Reply Comments at 1.

As wireless broadband usage continues to increase, PCIA's members have found new and innovative ways to keep up with demand, including the deployment of DAS and small cell networks. DAS and small cell network deployment benefits from improved access to rights-of-way and utility infrastructure. PCIA asserts that revising the PARs to include wireless attachments will increase the availability of mobile broadband access. *Id.* at 1-2.

According to PCIA, investment and competition have powered a shift from wireline to wireless platforms. In the second half of 2014, more than 45% of Americans relied solely on wireless voice communications. In 2012, 49% of adults and 60% of children in Arkansas lived in wireless-only homes. PCIA states that a continuing increase in wireless demand will require additional wireless investment. In 2013, U.S. mobile usage grew 120% and today, almost two-thirds of Americans own smartphones. Mobile video is expected to grow nearly nine-fold by 2019, requiring deployment of new cell sites to deliver the needed capacity. *Id.* at 2-4.

In addition, PCIA states, the increased demand created by smartphones, laptops and tablets, “the Internet of Things (IoT) will require an expanded wireless infrastructure footprint to power key machine-to-machine (M2M) connections.” According to PCIA, M2M traffic is predicted to grow 49-fold from 2014 to 2019, enabling applications like “mobile health, industrial and agricultural automation, utility and environmental monitoring, and inventory tracking and logistics.” M2M connections also support more consumer-focused wearable technology (watches, glasses and fitness trackers). PCIA estimates that wearable device shipments, which require an always-on, always-present connection, will reach 750 million units by 2020. *Id.* at 4-5.

PCIA states that wireless services play a critical role in public safety. More than 70% of emergency calls are placed with a wireless device. Encouraging increased wireless coverage will ensure Arkansas citizens and first responders have access to public safety communications.

PCIA also asserts that wireless infrastructure development provides economic growth. A PCIA-commissioned study indicates wireless “investment of \$34 to \$36 billion per year through 2017 would yield \$1.2 trillion in economic development and 1.3 million net new jobs.” Another analyst report estimates wireless will reach a 5% contribution rate to the U.S. gross domestic product by 2020. By ensuring revisions to the PARs encourage rapid deployment of wireless facilities, Arkansas will safeguard its competitiveness, foster increased wireless capacity and coverage, and have the benefits of innovative applications and services. *Id.* at 5-6.

PCIA states that DAS Pole Attachments provide greater capacity and extend

coverage to difficult to reach areas. These networks are primarily composed of a fiber backbone that delivers traffic to and from small nodes located in the public rights-of-way. The nodes are comprised of antennas and electronic equipment that converts radiofrequency to optical signals. Many of the networks are neutral-host DAS. A carrier or third-party infrastructure provider builds many of the network components, which allows the sharing of the common network backbone. Each carrier provides its own “centrally-located head end equipment.” The neutral-host model lowers entry barriers, ensures efficient use of poles, and encourages broadband deployment. Poles typically support the fiber and node attachments. At least one PCIA member is bidding on projects that would require fiber and node equipment on poles in Arkansas. *Id.* at 6-8.

PCIA notes that, in 2009, “Congress directed the FCC to develop a National Broadband Plan (NBP) that would ensure every American has access to broadband services.” Like CTIA, PCIA references the resulting NBP, which the FCC adopted in 2011, along with an Order to help ensure timely and rationally priced access to poles, including the attachment of wireless antennas on pole tops. Since the Arkansas Commission has exercised reverse preemption, PCIA is seeking to ensure its members receive the benefits and protections of federal law by ensuring the PARs reflect these national priorities. *Id.* at 8-9.

PCIA recommends that the Commission adopt PARs that “allow[] providers with wireless attachments clear access to utility infrastructure – including pole-tops – shortens Make-Ready timelines, provides attachers the option to replace poles for capacity enhancements, improves dispute resolution options, and adopts a rate formula

in line with the FCC's 'cable rate.'" *Id.* at 13.

Staff Reply Comments

Staff continues to support its Initial Comments, but modifies its proposed Rules in response to the Initial Comments of the following parties: AECC, SWEPCO, EAI, PCIA, CTIA, Craighead, and Joint Commenters. The specific revisions made by Staff in response to those Initial Comments are highlighted herein and in the section-by-section Commission Discussion that follows below. Staff notes that the highlighting is only for reference purposes and is not included in the Clean Version of the Rules submitted as Attachment B (and attached hereto as Commission Exhibit 1). In conclusion, Staff requests that the Commission adopt Staff's recommended PARs as so modified and included in Attachment B to its Reply Comments.

AECC Second Reply Comments

AECC continues to recommend Staff's Proposed Rules as modified by AECC in its Reply Comments. AECC's second reply comments focus on the rate formula and safety and reliability matters. AECC Second Reply Comments at 1 and 22.

SWEPCO Second Reply Comments

SWEPCO generally supports the reply comments filed by AECC and other electric Pole Owners. These parties emphasize the importance of establishing terms and conditions that are stringent enough to ensure safety and reliability, but flexible enough to expand broadband. SWEPCO Second Reply Comments at 1.

SWEPCO asserts that CTIA and PCIA's proposals would allow Attaching Entities to build facilities without regard to potential safety hazards and without recognition of the impact on infrastructure reliability. SWEPCO states that these parties also seek to

attach at a *de minimis* cost on infrastructure paid for by Arkansas electric ratepayers. SWEPCO is concerned that these proposals would degrade safety and reliability and under-recovery of Pole Attachment expenses, “causing Arkansas electric ratepayers to carry a heavier burden for maintaining pole plant that serves all.” *Id.* at 2.

SWEPCO states that Staff attempted to balance the need of Attaching Entities to expeditiously construct their facilities in the most cost efficient manner and maintain safety and reliability and to ensure that costs attributable to the cost causer are paid by such cost causer. SWEPCO states that although it did suggest a few edits in its Reply Comments, “for the most part the Staff achieved an equitable balance.” The Attaching Entities seek to diminish the safeguards Staff developed and push costs created by Attaching Entities on to the bills of electric ratepayers. *Id.* at 2.

SWEPCO recommends Staff’s proposed rules modified as requested by SWEPCO. This would achieve “equitable cost allocation, ensure safe and reliable facilities, and facilitate the expansion of broadband service within the state of Arkansas.” *Id.* at 10.

Joint Commenters Second Reply Comments

Because all of the Joint Commenters are Attaching Entities and some are also Pole Owners, Joint Commenters contend their comments represent a balance between attachers and Pole Owners. Joint Commenters contend that the comments of electric Pole Owners and their proposed modifications do not strike a similar balance. Joint Commenters state that many of the rules proposed by electric Pole Owners, primarily from AECC, seek rates, terms and conditions that have been broadly rejected by courts, state legislatures, and regulators across the country. Joint Commenters view AECC’s suggested changes as being based on “unsubstantiated information, particularly with

regard to terms and conditions surrounding safety standards and inspections.” Joint Commenters contend that the FCC’s cable formula produces rates that are compensatory to Pole Owners and have been repeatedly found to be just and reasonable and not a subsidy. Joint Commenters note that the majority of the twenty certified states have adopted the cable formula or a variation thereof. Joint Commenters Second Reply Comments at 5-6.

Joint Commenters assert that independent review refutes the claim that attachers threaten the safety of pole infrastructure, and maintain that attachers have a responsibility to maintain safe plant, which field personnel typically address in the course of business. Joint Commenters identify a number of Electric Cooperative practices that place Attaching Entities out of compliance. *See*, Second Reply Exhibit JC-2. Joint Commenters state that most of the discrepancies in billed versus actual attachments are caused by “inadequate electric utility record keeping processes and/or by unilateral utility revisions of what constitutes a ‘billable attachment’ (e.g. drop poles), not by attachers seeking to avoid the permitting process.” Joint Commenters Second Reply Comments at 6.

Joint Commenters believe the cable formula and their proposed rules ensure Pole Attachments proceed on a nondiscriminatory, just, and reasonable basis. This will ensure effective regulation, just and reasonable rates, and the reliability of electric services, while balancing the interests of communications and electric utility customers. Joint Commenters believe that rules proposed by Staff and by electric utilities are not consistent with effective Pole Attachment regulation and the statutory requirements of Act 740. *Id.* at 7.

Joint Commenters argue that AECC's claim that Pole Attachment rates do not have a significant impact on broadband deployment defies basic economic rules and is based on invalid and overly simplistic assumptions. Ms. Kravtin explains that the public policy rationale for lower, but compensatory, rates is not predicated on showing specific empirical data or a direct linkage to subscribership, any more than "state fiscal policy in favor of minimizing taxes in order to promote capital investment and economic growth in the State of Arkansas does." Joint Commenters note that FCC's Broadband study analyzed the impact of Pole Attachment rates on broadband deployment and found that the negative impact of Pole Attachment rates on "broadband services competition, deployment and affordability and adoption rates [is] significant." Ms. Kravtin analyzed AECC's specific data and found the negative impact "to be in the neighborhood of \$9 to \$15 per month per subscriber." Joint Commenters assert that the relatively price-elastic demand for broadband services magnifies this negative cost impact. Joint Commenters state that with Arkansas' low ranking in terms of broadband availability and adoption, "Arkansans cannot afford what would effectively be a broadband tax created by high Pole Attachment rates." *Id.* at 56-57.

Joint Commenters state that AECC's citation of statistics regarding the capitalization, revenue, and profits of communications attachers is nothing more than a ploy to convince the Commission that they can afford to pay excessively high Pole Attachment rates. Joint Commenters say such statistics are irrelevant in determining just and reasonable rates for access to essential facilities such as poles and that the size of a Pole Owner or attacher has no bearing on the "pole owner's leverage over an attacher." *Id.* at 58.

PCIA argues that AECC makes another irrelevant argument by comparing the growth rate of an average cable bill with that of an electric bill. Ms. Kravtin explains that AECC's comparison is "overly simplistic and not economically meaningful." For example, AECC does not adjust for the "differing quality and characteristics changes of the services being provided over time," a fundamental component of price index analysis that is recognized by the Bureau of Labor Statistics as "hedonic" pricing adjustments. Ms. Kravtin states that "a service like electricity is quite static and therefore not subject to any notable hedonic adjustment." However, "that is not the case for multichannel video programming services, which are highly dynamic services." Joint Commenters recommend the Commission dismiss AECC's "irrelevant arguments because such consideration has no place in effective regulation. *Id.* at 58-59.

Joint Commenters also argue that CECC's taking arguments are without merit and that the proposed rules do not impact CECC's easement rights. Joint Commenters assert that Attaching Entities acquire easement rights independently of the rules and that CECC's unconstitutional taking of property argument has been "repeatedly rejected by the courts, including the United States Supreme Court." In addressing the FCC's cable formula, the Supreme Court found that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory." Joint Commenters also reference the NBP's finding that cable rate has been in place for thirty-one years, is just and reasonable, and fully compensatory to utilities. According to Joint Commenters, Staff's proposed formula and the cable formula are consistent with the Arkansas and United States Constitutions. *Id.* at 59-60.

Joint Commenters recommend the Commission "revise Staff's amendments to

the PARs as specifically requested herein.” *Id.* at 60.

CTIA Second Reply Comments

CTIA believes there is agreement among the parties that all Pole Attachments must comply with safety and electrical codes and parties must be allowed to attach at a reasonable rate. However, the significant divide occurs on how to implement these principles. CTIA argues that the FCC’s cable formula best balances the interests of all stakeholders by providing reasonable Pole Attachment rates, access to timelines, and other non-rate terms and conditions that encourage competition and widespread deployment of services. CTIA states that the FCC’s cable formula is the most prevalent methodology, adopted by numerous states, and endorsed repeatedly in court. CTIA recommends the Commission adopt the FCC cable formula for wireless attachments. CTIA Second Reply Comments at 1-3.

CTIA agrees with PCIA’s and Joint Commenters’ positions regarding the cable formula, position on pole access, access timelines and non-rate terms and conditions. CTIA states that, like cable companies, wireless carriers face local government resistance to construction of duplicative pole networks and find the cost of constructing them to be infeasible. CTIA argues that communications providers have little choice but to rent space on the pole, over which Pole Owners have a monopoly. CTIA urges that the revenue generated by attachments in surplus space “should be reason enough to encourage Pole Owners to permit attachments.” The generated revenues offset the cost of providing electric service, which benefits both electric cooperatives’ members and utility ratepayers. There is also a benefit “from shared poles via the broadband network improvements that such sharing enables.” CTIA states PCIA’s discussion of the

“Internet of Things” is particularly significant. *Id.* at 3-4.

CTIA argues that AECC’s positions will not promote broadband in Arkansas and will likely drive investment to other states. CTIA points to the power of electric utilities to condemn private property for their facilities and to control access to public corridors critical for the provision of communications services. CTIA states that AECC seeks to codify the most restrictive access practices of its most aggressive members and to discourage investment by communications providers. *Id.* at 23-24.

CTIA asserts that AECC’s reference to the out-of-state headquarters of companies seeking to expand broadband in Arkansas is irrelevant because many of them are national in scope. *Id.* at 24-25.

While AECC believes that cooperatives best understand the needs and interests of their communities, CTIA notes that the legislature placed the regulation of the Cooperatives’ electric services *and* the rates, terms and conditions of Pole Attachments under the jurisdiction of this Commission. CTIA recommends the Commission adopt rules in a manner consistent with CTIA’s Reply and Second Reply Comments. *Id.* at 25.

PCIA Second Reply Comments

PCIA generally supports the Reply Comments of CTIA and Joint Commenters, who urge the Commission to modernize its Pole Attachment rules to spur broadband deployment. CTIA reiterates that Arkansas is near-last in the nation in broadband availability and adoption, and that its rules are out of step with neighboring states, particularly with respect to rates. CTIA seeks access to poles at reasonable rates to create certainty for attachers, including wireless, and promote broadband deployment.

PCIA Second Reply Comments at 1-2.

PCIA also opposes inclusion of a *force majeure* provision in the rules. PCIA states that it is unnecessary to add these provisions to the PARs because they are typically included in negotiated agreements. *Id.* at 11. PCIA recommends the Commission adopt rules based on its Reply and Second Reply Comments. *Id.* at 11.

3. Detailed, Section-by-Section Modifications by Staff, Comments of the Parties, and Commission Findings on Contested Issues

The following section-specific comments, followed by Commission findings, are based upon the Commission's review of Staff's recommended proposed Pole Attachment Rules shown below, as modified by Staff in its Reply Comments in response to the comments of the parties. Provisions of the PARs that are unchanged from the existing PARs adopted by Order No. 5 in Docket No. 08-073-R are shown in black. Provisions that are deleted, new, or modified by Staff's Initial Comments are shown in red and red ~~strikethrough~~. Provisions that are deleted, new, or modified by Staff's Reply Comments in response to the parties are shown in red and red ~~strikethrough~~ with yellow highlighting. The Commission's discussion and findings with respect to: (a) Staff's proposals as modified and (b) the comments of all of the parties, address the proposed Commission new or modified language (sometimes in quotation marks) in the Findings discussions. The Commission accepts as reasonable and in the public interest the proposed changes or additions which are uncontested by any party. The Commission's modifications to Staff's modified PARs are shown in the black-line Attachment A, with additions shown in black underlined and deletions shown in black ~~strikethrough~~. A clean version of the Commission's modified PARs is included as Attachment B.

SECTION 1. PURPOSE, APPLICABILITY, AND GENERAL MATTERS

Rule 1.01 Definitions

Staff Initial Comments

The Definitions Section was modified to include terms and their definitions necessary for proper interpretation of the PARs. The Definitions come from Act 740 of 2007, Ark. Code Ann. § 23-4-1001 *et seq.*, The American National Standards Institute's National Electric Safety Code (NESC), The National Electric Code (NEC), FCC Regulations, informal responses of collaborative participants, and other sources. In addition, the Definitions Section was reformatted and placed under the umbrella of Section 1, rather than as a stand-alone section, to make it more consistent with the Commission's *Rules of Practice and Procedure* (RPPs).

The following definitions shall apply throughout the Pole Attachment Rules (PARs) except as otherwise required by the context and any references to the PARs shall include these definitions:

- (a) **“Attaching Entity.”** ~~An electric service provider, telecommunications provider, cable television service provider, Internet access service provider, or other information services provider to the extent that its anticipated and actual Pole Attachments are regulated by these Rules. An electric utility, a telecommunications provider, a cable television service provider, or a cable Internet access service provider.~~ **The term "Attaching Entity" does not include a Public Utility pole owner Pole Owner to the extent that it makes Pole Attachments to its own poles, Ducts, or Conduits.**

AECC Reply Comments

This definition includes the term “service.” AECC states this is confusing as a service is not an entity. AECC proposes that if the term “service” is necessary, then it should be changed to “service provider.” AECC Reply Comments at 30.

PCIA and CTIA Reply Comments

The current proposed PARs contemplate only three types of attachers, electric utilities, cable telephone or internet, and telecommunications. PCIA and CTIA recommend that the Commission clarify that service providers with wireless attachments are included in the telecommunications category. This clarification is necessary to ensure that providers with wireless attachments are afforded the same protections under the PARs. PCIA Reply Comments at 9, CTIA Reply Comments at 7-11. CTIA states that its member companies are committed to complying with the appropriate designated safety and electric codes and contends that if Pole Owners are willing to collaborate earnestly, there is no reason wireless attachments cannot be safely and compliantly attached to poles, including pole-tops. CTIA Second Reply at 14.

Staff Reply Comments

Staff agrees with AECC and refined the definition. Staff Reply Comments at 1-2.

Commission Finding

The Commission finds that the revisions to this definition by Staff vary from the language of Ark. Code Ann. § 23-4-1001(1)(A) and that the definition should be revised to more closely use the statutory language:

“Attaching Entity.” A provider of electric service, telecommunication service, cable television service, internet access service or other related information services. The term "Attaching Entity" does not include a Pole Owner to the extent that it makes Pole Attachments to its own poles, Ducts, or Conduits.

The Commission further finds that Act 740 does not limit “telecommunications service” (or any other service delineated in Ark. Code Ann. § 23-4-1001(1)(A)) to services offered only via wires, as opposed to services offered via wireless means. Consequently, it is

unnecessary to make the additions recommended by PCIA and CTIA to the term “telecommunication service” (or any other of the services listed) in the definition of “Attaching Entity.” Therefore, the Commission adopts the above definition as reasonable and in the public interest.

(b) “Conduit.” A structure containing one or more Ducts, usually placed in the ground, in which cables or wires may be installed.

*(No contested issues)*⁸

(c) “Duct.” A single enclosed raceway for conductors, cable or wire.

(No contested issues)

(d) “Inner-Duct.” A Duct-like raceway smaller than a Duct that is inserted into a Duct so that the Duct may carry multiple wires or cables.

(No contested issues)

(e) “Insufficient Capacity.” The inability of a Pole Owner to accommodate a new Pole Attachment or Overlashing through the performance of Make-Ready Work.

SWEPCO Reply Comments

SWEPCO recommends replacing “performance of Make-Ready Work” in Rule 1.01 (e) with “rearrangement of facilities,” noting that the 11th Circuit of the U.S. Court of Appeals reviewed this matter and found that the Pole Owner had the discretion to deny access where a pole must be changed out to increase capacity. SWEPCO states that it routinely changes out poles to accommodate attachments, but there are cases where this can be burdensome to the Pole Owner. SWEPCO requests that the changing out of poles be left to the Pole Owner’s discretion. SWEPCO Reply Comments at 2.

⁸ This notation indicates that no party raised specific issues on the section of the proposed rules.

Commission Finding

For the reasons explained in the Commission's discussion *infra* of Rule 1.01(f) on the definition of "Make-Ready Work," the Commission declines to adopt SWEPCO's recommendations and accepts as reasonable and in the public interest Staff's recommendation for Rule 1.01(e) regarding the definition of "insufficient capacity" including the phrase "performance of Make-Ready Work."

(f) "Make-Ready Work." Engineering or construction activities necessary to make a pole, Duct, Conduit, or other support equipment available for a new Pole Attachment, Pole Attachment modifications, or additional facilities.

Joint Commenters Reply Comments

Joint Commenters state that, when a new pole is required in order to accommodate attachments, the attacher typically pays for the cost of the new pole and the Pole Owner retains ownership. They propose to add a sentence to clarify that Make-Ready work includes the replacement of a pole with a taller or stronger pole. This is an important clarification since Rule 2.04(a) allows for denial of access due to insufficient capacity, which is the inability to accommodate an attachment through the performance of make ready work. This would clarify that access cannot be denied if the insufficient capacity could be cured with the replacement of the pole. Joint Commenters Reply Comments at 13-14.

SWEPCO Second Reply Comments

Pole Top Antennae – SWEPCO states that both PCIA and CTIA recommend the Commission require Pole Owners to allow the attachment of large communications antennae on distribution poles. PCIA recommends Pole Owners be required to replace

poles with taller facilities to accommodate these attachments. SWEPCO states that CTIA proposes that the pole top attachers only be required to pay for one foot of space, even though the attachment and supporting equipment often occupy more than five feet of space and involve extensive make ready work to address “new loading, potential contact with electric facilities, and risks to facilities presented by lightning strikes on such antennae.” SWEPCO states that the request to pay for only one foot of space is not equitable due to the extensive use of the pole by the antennae Attaching Entity. The Attaching Entity often requests to attach power supplies, control boxes, and risers up and down the pole. In addition, the existence of such equipment often requires a larger buffer spaces in order to avoid worker radio frequency exposure and contact with electric facilities. SWEPCO recommends a rate based on the actual burden placed on the pole. SWEPCO Second Reply Comments at 3.

SWEPCO states that it allows antennae attachments when the attachment does not “compromise the integrity of SWEPCO’s distribution system, adversely affect other attaching parties, or put at risk the safety of all workers.” These attachments are better suited for the communications zone of the pole. However, SWEPCO does allow some pole top installations on street light poles and secondary poles if it can be done without compromising safety and reliability. Each installation is unique and presents its own set of facts for review. SWEPCO argues that broad rule that all such equipment must be accommodated on all types of poles is not good policy given the underlying engineering and safety considerations. SWEPCO recommends giving discretion to the Pole Owner to allow certain facilities based on “safety, reliability, capacity and SWEPCO’s internal standards.” This discretion could be challenged by the attaching party if SWEPCO does

not act in a reasonable and non-discriminatory manner. SWEPCO Second Reply Comments at 3-4.

SWEPCO states the Joint Commenters propose that Pole Owners be prohibited from denying access based on a lack of pole capacity. According to SWEPCO, however, in some circumstances replacing a pole is too disruptive to SWEPCO's operations. For example, changing out a 55' pole with existing double circuits and a transformer bank to a taller structure would cause extensive customer outages and may be more difficult to service in the future with existing bucket trucks. In such cases, SWEPCO should be allowed to deny access. In addition, SWEPCO points out that the FCC accepts that Pole Owners must be given the discretion to deny access based on insufficient capacity. SWEPCO Second Reply Comments at 4-5.

Joint Commenters Second Reply Comments

Joint Commenters continue to support a clarification that access cannot be denied for insufficient capacity if replacement of the pole will cure the lack of capacity. Joint Commenters Second Reply Comments at 7. Joint Commenters state that SWEPCO misapplies *Southern* in support of unilaterally denying pole access. Joint Commenters assert that a federally regulated electric utility cannot discriminate among attachers (or in favor of itself) in its willingness to change out poles. If the electric utility changes out poles (or employs other capacity expanding Make-Ready techniques) for its own new or modified attachments, it must do the same for cable and telecommunications attachers. According to Joint Commenters, Act 740 gives the Commission broad power to "regulate the rates, terms and conditions upon which a public utility shall provide access for a Pole Attachment." Noting that an administrative

interpretation of a statute is highly persuasive and will not be disregarded by a reviewing court unless it is clearly wrong, Joint Commenters state that a Commission decision to require Pole Owners, at the Attaching Entity's expense, to change out poles to accommodate attachments is "clearly not wrong or contradictory to any provision of Act 740." Joint Commenters Second Reply Comments at 8-9.

Commission Finding

The Commission agrees with Joint Commenters that Make-Ready work could include, where feasible, the replacement of a pole. However, as stated by SWEPCO, there may be circumstances where replacing a pole would be too disruptive to utility operations and denial of access may be appropriate. The Commission finds that the parties' Pole Attachment agreement is the appropriate mechanism for defining when denial of access due to insufficient capacity is permitted. If the parties are unable to reach an agreement, the issue can be brought before the Commission through the complaint process. Therefore, the Commission finds it unnecessary to modify Staff's proposal and finds Staff's proposed rule to be reasonable and in the public interest.

(g) "NEC." The National Electrical Code published by the National Fire Protection Association.

(No contested issues)

(h) "NESC." The American National Standards Institute's National Electrical Safety Code published by the Institute of Electrical and Electronics Engineers, Inc.

(No contested issues)

(i) "Overlashing." The placement of telecommunications provider, cable television service, or Internet access service facilities on existing facilities that already are attached within the Usable Space allocated to an existing Attaching Entity. Overlashing is not considered a separate Pole Attachment.

(No contested issues)

(j) “Pole Attachment.” As defined in Ark. Code Ann. § 23-4-1001(1).

PCIA and CTIA Reply and Second Reply Comments

PCIA and CTIA request that the Commission clarify that wireless attachments, including pole-top attachments, are included in the PARs. PCIA Reply Comments at 2; CTIA Second Reply Comments at 4-5. PCIA states that access to pole-tops provides a greater radiofrequency footprint and is often necessary for seamless network design requirements. The larger radiofrequency footprint provides the same coverage amount with fewer total attachments. *Id.* at 9. CTIA adds that wireless attachments should receive the “same benefits and protections under the rules as any wired attachments.” CTIA states that the antenna installation fits within the current definition because of the need for fiber connectivity, but it should be explicit that the definition applies to wireless attachments. CTIA Second Reply Comments at 4-5. CTIA also states that access should be for traditional usable space and pole tops, consistent with the FCC’s 2011 Pole Attachment Report and Order. CTIA Reply Comments at 2.

Commission Finding

“Pole Attachment” is defined by the statute and Staff’s proposed definition properly references the statutory definition. As noted by the Commission in its finding with respect to the definition of “Attaching Entity” in Rule 1.01(a), Act 740 does not limit “telecommunication service” (or any other service delineated in Ark. Code Ann. § 23-4-1001(1)(A)) to services offered only via wires, as opposed to services offered via wireless means; thus “Pole Attachment” is not limited by statute to attachments which

provide services offered only by wire. Accordingly, the Commission finds CTIA's and PCIA's proposed modification to Rule 1.01(j) to be unnecessary and further finds that Staff's citation to the statute for the definition of Pole Attachment is reasonable and in the public interest.

(k) "Pole Attachment Audit." Any audit done at the option of the Pole Owner to count the number of Pole Attachments by one or more Attaching Entities.

(No contested issues)

(l) "Pole Owner." A public utility as defined in Ark. Code Ann. § 23-4-1001(2), having ownership or control of a pole, Duct, or Conduit.

(No contested issues)

(m) "Safety Inspection." Any inspection done at the option of the Pole Owner to ensure Pole Attachments comply with applicable safety standards.

(No contested issues)

(n) "Safety Space." As defined in the current issue of the NESC, the space located between the areas to which electric conductors and communication circuitry may be attached.

SWEPCO Reply Comments

SWEPCO recommends changing "Safety Space" to "Communications Workers Safety Zone" to align it with the defined term in the NESC. SWEPCO Reply Comments at 2-3.

Joint Commenters Reply Comments

Joint Commenters proposes to change this definition to the space between the lowest power supply cable or equipment and above the communications attachments. The NESC expressly contemplates that the 40-inch safety space will often be reduced to

30 inches due to attachments within the safety space. Joint Commenters Reply Comments at 14-15.

Joint Commenters Second Reply Comments

Joint Commenters disagree with SWEPCO's proposal to change this term to "Communications Worker Safety Zone." Safety space is a term commonly used by Pole Owners and attachers and has been consistently used by Staff in its proposed rules in this docket and in the 2008 rulemaking. Joint Commenters Second Reply Comments at 9.

Commission Finding

The Commission finds Staff's proposed definition of "Safety Space" to be commonly used and consistently understood and thus reasonable and in the public interest and preferable to SWEPCO's proposed "Communications Workers Safety Zone" or to Joint Commenters' proposed definition.

(o) "Service Drop." A connection from distribution facilities to the building or structure being served that does not require guys under standard industry design practice.

(No contested issues)

(p) "Unusable Space." The Unusable Space is equal to the length of the pole minus the Usable Space. Safety Space is included in Unusable Space.

AECC Reply Comments

AECC believes a more appropriate term would be "Common Space." This space is used by communications companies to attach equipment and vertical riser cables. AECC Reply Comments at 30.

Staff includes the 40-inch safety space in unusable space. The NESC calls this

safety space the “communication worker safety zone.” The space is necessary to protect communications workers from energized facilities. AECC states the costs associated with the safety space are entirely caused by and only benefit the Attaching Entities. Like the unusable space, the safety space should be divided equally among the Attaching Entities and the Pole Owner, if not allocated 100% to the Attaching Entities. AECC Reply Comments at 12-13.

Joint Commenters Reply Comments

Joint Commenters state that the inclusion of the safety space in unusable space “conflicts with long-standing legal precedent, common electric practices, and the NESC.” In addition, Joint Commenters argue that this inclusion results in double recovery by the electric utility and excessive Pole Attachment rates. The FCC and nearly all state commissions define safety space as usable space because electric utilities routinely use this space for street lights, traffic signal wiring and electric utility equipment. Including safety space as unusable increases the presumptive amount of unusable space from 24 feet to 27.33 feet on a 37.5 foot pole, which increases the allocation percentage of total pole costs to attachers. Joint Commenters Reply Comments at 15-16.

Joint Commenters assert that electric Pole Owners may receive compensation for providing the street light or providing space, selling electricity for lighting, and maintenance of the street or traffic light. Recovery of the costs associated with these attachments should be recovered from the users of the space, including the Pole Owner itself. Joint Commenters object that under Staff’s proposal, communications attachers would be paying for the same space – space where they do not attach, giving the Pole

Owner an opportunity for double recovery of the costs associated with the safety space. Joint Commenters agree with the rationale contained in Patricia Kravtin's report that if the communications attachments are allocated greater costs due to the reclassification of the safety space as unusable, then they should logically share in the utility's rental revenue for this space as a revenue offset to their rental rate. Joint Commenters Reply Comments at 17.

Joint Commenters assert that the FCC has considered the safety space as usable since 1979 and that this position has been sustained on appeal and reaffirmed by the FCC in 1984, 1998, 2000, and 2001 rulemakings, and in contested cases. Joint Commenters state that the FCC's rationale is best explained in its 2000 Order. The FCC noted that a one-inch diameter fiber optic cable attachment is presumed to occupy one foot of space due to separation requirements. An electric supply cable must be separated by 40 inches from communications attachments. No one questions classifying the eleven inches not physically used by the communications attachment as usable space. Because the electric supply cable prevents other attachments from using the safety space, the safety space is usable space for the electric supply cable. In addition, the electric utility is not limited by the NESC in the equipment they can attach in the safety space. Joint Commenters Reply Comments at 17-19.

Joint Commenters also point out a potential conflict in Staff's proposed rules on usable and unusable space. Staff's definition of usable space includes fiber optic cable as an item that can be attached in usable space. The NESC permits fiber optic cable attachments used by the electric utility in the safety space. "Therefore, since fiber optic cable can be attached in the Safety Space, the Proposed Rules, by its definition of Usable

Space, also contemplate Safety Space as Usable Space.” Joint Commenters Reply Comments at 19.

Joint Commenters recommend the second sentence in the definition of Unusable Space be deleted and added to the definition of Usable Space, which is “consistent with the vast majority of states, the FCC and effective rulemaking under Act 740.” Joint Commenters Reply Comments at 19.

AECC Second Reply Comments

AECC continues to recommend the safety space be allocated entirely to Attaching Entities. Attaching Entities receive direct benefits, including (1) a safer work environment for their employees; (2) wage savings resulting from not having high-voltage trained employees; (3) lower training costs due to elimination of high voltage worker training and certification; and (4) the avoided cost of not using “insulated” equipment necessary for work on high voltage facilities. In addition, the safety space exists because of the presence of communications attachments. A Washington State superior court found that equal allocation was appropriate because the space primarily exists for the safety of non-electric attachments. The court concluded it would be reasonable to allocate all of the space to Attaching Entities. Consistent with this opinion, Delaware allocates all of the space to Attaching Entities. AECC Second Reply Comments at 11-12. Joint Commenters argue that the FCC concluded the purpose of the safety zone was to benefit electric utility attachments. However, the NESC calls this space the “Communications Worker Safety Zone,” which reflects the purpose of protecting communications workers from energized lines. AECC states the costs associated with the safety zone are “entirely caused by and directly benefit the communications Attaching

Entities” and the space should be allocated 100% to Attaching Entities. AECC Second Reply Comments at 12-13.

If the costs associated with the safety zone are not allocated 100% to Attaching Entities, AECC recommends the space be designated unusable and divided equally. Under Staff’s proposed formula, Unusable Space is allocated one-third to the Pole Owner and the remaining two-thirds is allocated equally among the Pole Owner and Attaching Entities. Joint Commenters assert Staff’s reclassification of the safety space to Unusable Space is a “non-cost causative linkage into the formula.”⁹ AECC responds that this is not true and maintains that the costs associated with the safety space are caused by Attaching Entities and the Attaching Entities receive benefits from the safety space. AECC Second Reply Comments at 13-14.

While Joint Commenters contend the electric cooperatives use the safety space for streetlights and other facilities, AECC maintains that street lighting is rarely installed in the safety space, which is allowed by the NESC. AECC states that the lighting is installed more often on separate poles or in the supply space, or is already affixed to the pole when the Attaching Entities place their facilities. AECC asserts that such lighting does not introduce a high voltage facility and does not compromise the benefits Attaching Entities receive from the safety space. In addition, Attaching Entities receive a benefit from the lighting because the Occupational Safety and Health Administration (OSHA) requires workers be provided with “illumination of the field of work” for telecommunications facilities. AECC Second Reply Comments at 15-16.

While Joint Commenters argue that the Pole Owner should pay for the safety

⁹ The formulas to be used by the Commission if the parties are unable to reach agreement are addressed *infra* in Section 4 of the Rules and are set forth in Appendix A to the PARs.

space because they use it to install lighting, AECC recommends that if the Commission agrees, then the reasoning should be applied to the entire amount of unusable space. Attaching entities routinely use the below and above ground unusable space to “run their conduits, transitions, and power supply,” which can run the entire length of the unusable space or weigh in excess of 400 pounds and can create significant stress on the pole, according to AECC. AECC asserts that, if using the safety space for street lighting merits costs be allocated to the Pole Owner, then the same should hold true for the Attaching Entities use of the unusable space. AECC Second Reply Comments at 16.

SWEPCO Second Reply Comments

SWEPCO states the Attaching Entities continue to propose that they should only pay for 7.4% of the cost of the pole for each attachment. This is based on the theory that they should not share in the cost of the safety zone. NESC refers to the forty inch safety zone as the “communications worker safety zone.” The separation is required because not all communications workers are trained to work in close proximity with energized facilities. Arguably all of the safety zone space should be allocated to the Attaching Entities. However, as a compromise, Staff assigned only one foot of space to the attacher and the remainder to the Pole Owner. SWEPCO states this position is consistent with many joint use agreements between electric utilities and incumbent local exchange carrier Pole Owners. It is also consistent with Louisiana, which allocates one foot of the safety zone to the attaching party. SWEPCO Second Reply Comments at 8-9.

Joint Commenters Second Reply Comments

Joint Commenters see no need to change the name of “Unusable Space.” This is a common industry term and has been consistently used by Staff in this docket and in the 2008 rulemaking. Joint Commenters Second Reply Comments at 9.

The safety space is used exclusively by electric utilities. Joint Commenters state that the issue is not whether this space is a barrier between electric and communications facilities, but rather whether the space is usable and by whom. Joint Commenters provide several photographs that illustrate the electric utility practice of installing facilities in the safety space (Second Reply Exhibit JC-3). AECC claims they must install poles that can accommodate the 40-inch safety space. However, they do not provide evidence to support their claim and fail to mention that when the safety space is absent, the attacher pays Make-Ready costs to create the space. The Make-Ready costs include paying for a new pole that becomes the property of the Pole Owner who can then rent out the additional space. In addition, AECC proposes the costs associated with the safety space be divided equally rather than be subject to Staff’s proposed 2/3 multiplier. Ms. Kravtin states AECC’s contention that the costs associated with the safety space are caused by and directly benefit attachers is not true from an economics standpoint. From an economics perspective, no costs should be assigned to the attacher because only the Pole Owner is able to attach in this space and all revenues associated with rental of this space accrues to the Pole Owner. Joint Commenters state there is no valid reason for assigning the safety space as unusable. Doing so improperly forces attachers to pay for space that electric utilities use and space for which the Pole Owner is already compensated. Joint Commenters Second Reply Comments at 41-43.

CTIA Second Reply Comments

CTIA agrees with Joint Commenters and Ms. Kravtin's report, the safety space is not unusable space. Electric Pole Owners routinely use this space for their own purposes. Under CTIA's approach the safety space would be classified as usable space because it is used by the electric utility and it should be assigned to the Pole Owner, which is the approach used by the FCC. CTIA Second Reply Comments at 11-12.

Commission Finding

The Commission finds Staff's proposed definition of the term "Unusable Space" to be reasonable. The Commission also finds that "safety space" serves the dual purpose of being available for use by electric utilities to place street lights and other facilities and provide a barrier between electric and communications facilities. Staff's proposal to include "safety space" in the unusable space would allocate the cost of this space to the Pole Owner and Attaching Entities. Therefore, the Commission finds that Staff's proposal in Rule 1.01(p) to include the "safety space" in the definition of "Unusable Space" achieves an equitable balance and is reasonable and in the public interest.

(g) "Usable Space." The space available for circuit, communications, coaxial cable, fiber optic, or electrical conductor Pole Attachments, by Public Utilities and Attaching Entities.

AECC Reply Comments

AECC states the definition of "Usable Space," as drafted, could include space below the minimum grade level for attachments. AECC proposes a clarification that it only includes space above the minimum grade level for horizontal attachments. In addition, AECC believes a more appropriate term is "Assigned Space." AECC Reply

Comments at 30.

Joint Commenters Second Reply Comments

Joint Commenters see no need to change the name of “Usable Space.” This is a common industry term and has been consistently used by Staff in this docket and in the 2008 rulemaking. If the Commission is going to modify this term, the long-standing, widely-used and much interpreted FCC definition should be adopted. Joint Commenters Second Reply Comments at 9-10.

Commission Finding

The Commission finds AECC’s proposed clarification of the Rule to be reasonable and modifies Rule 1.01(q) to include “above minimum grade level” in the definition. The Commission otherwise finds the proposed definition of “Usable Space” to be reasonable, in that it is a common industry term that has been consistently used by Staff in this docket and in the 2008 rulemaking.

Rule 1.0~~12~~ Authority

These Rules are promulgated pursuant to, and in accordance with, the provisions of Act 740 of 2007 as codified in Ark. Code Ann. § 23-4-1001 through § 23-4-1006.

(No contested issues)

Rule 1.0~~23~~ Applicability

These Rules apply to ~~Public Utilities~~ Pole Owners and Attaching Entities as defined in these Rules.

(No contested issues)

Rule 1.0~~34~~ Purpose and Scope

These Rules govern the Commission’s regulation of the rates, terms, and conditions upon which a ~~Public Utility~~ Pole Owner shall provide nondiscriminatory access for a Pole Attachment in the absence of a

voluntarily negotiated agreement. These Rules also govern the procedures necessary and appropriate to hear and resolve complaints arising from the failure or refusal to provide access, the inability of a ~~Public Utility Pole Owner~~ and an entity seeking access for a Pole Attachment to reach a voluntary negotiated written agreement, and disputes over implementation of an existing contract.

(No contested issues)

Rule 1.05 Negotiated Agreements

Nothing in these Rules prevents or limits the ability of a ~~Public Utility Pole Owner electric utility, a telecommunications provider, a cable television service, or an internet Internet access service~~—and an Attaching Entity to enter into a voluntarily negotiated written agreement regarding the rates, terms, and conditions ~~upon which access for a Pole Attachment access is provided~~. Voluntarily negotiated agreements are preferred and encouraged by the Commission. Nothing in these rules ~~should~~shall** be interpreted to supersede or modify any rate, term, or condition of a voluntarily negotiated written agreement.**

Staff Initial Comments

Consistent with Ark. Code Ann. § 23-4-1003(c), Rule 1.05 addresses a preference for voluntarily negotiated agreements. To emphasize this preference, the language of the last sentence was strengthened by changing “should” to “shall.” Staff expects, and these Rules anticipate, that Attaching Entities and Pole Owners will continue to negotiate the details of their Pole Attachment arrangements. As discussed below, these Rules are not intended to preempt the rates, terms, or conditions of voluntarily negotiated agreements.

In Docket No. 08-073-R, other parties suggested that the Commission include a provision in the Rules that would allow the Commission to modify or reform Pole Attachment contracts. Staff states that a plain reading of Ark. Code Ann. § 23-4-1004 shows that the Commission’s authority does not include modification of voluntarily negotiated contracts. Other parties stated in Docket No. 08-073-R that the FCC

interprets the federal law as granting it authority to reform contracts. Staff notes that state law differs from the federal Pole Attachment Act and the “interpretation of federal law by federal authorities is not dispositive of the interpretation of Act 740.” In addition, by passing Act 740, the General Assembly gave the Commission jurisdiction over Pole Attachment agreements and disputes, which preempts federal Pole Attachment regulation. Staff Initial Comments at 5-6.

In keeping with this concept, some parties in this docket suggest the inclusion of a provision that would allow an Attaching Entity to obtain access to poles by signing an agreement it disagrees with and then later filing a complaint with the Commission (a “sign and sue” provision). Staff Initial Comments at 5. This provision would allow an Attaching Entity to reject any provision of a negotiated contract and sue for reformation. Staff states this type of provision “is not consistent with Arkansas’ statutes, the Commission’s jurisdiction, or Staff’s recommended Rules.” Staff states that the complaint provisions address situations where the parties cannot reach a voluntarily negotiated agreement. If prompt access is an issue, the Attaching Entity could ask for immediate relief, such as allowing access pending a Commission decision, or for expedited treatment. Staff Initial Comments at 6-7.

OG&E Reply Comments

OG&E supports Staff’s proposed amendments to this Rule and its purpose of strengthening the preference for negotiated agreements. OG&E Reply Comments at 1.

AECC Reply Comments

AECC supports the clarification that Staff’s proposed rules do not supersede or modify the rates, terms and conditions of negotiated written agreements. AECC Reply

Comments at 31.

SWEPCO Reply Comments

SWEPCO agrees with Staff's support of negotiated agreements. These agreements allow parties to tailor their relationship to better address unique business concerns. Negotiated agreements have worked well for SWEPCO and it is not aware of any complaints arising out of SWEPCO's Arkansas agreements. SWEPCO Reply Comments at 3.

PCIA Reply Comments

PCIA recommends the inclusion of a "sign and sue" rule to ensure a Pole Owner does not abuse its monopoly power when entering into a Pole Attachment agreement. PCIA notes that the FCC has had this type of rule for years. Under the FCC's rule, an attacher can sign an agreement and then file a complaint with the FCC to contest an allegedly unfair element of the agreement. In addition, PCIA members have observed that "negotiations for Pole Attachments can run for many months or even years." PCIA recommends the Commission adopt a rule similar to the FCC. PCIA Reply Comments at 10-11.

SWEPCO Second Reply Comments

SWEPCO states that PCIA is proposing that the Commission adopt a "sign and sue" rule. An Attaching Entity would be permitted to negotiate a Pole Attachment agreement, execute it, and then challenge provisions of the agreement that was just signed as unreasonable. SWEPCO states that Staff has rightly rejected this proposal. SWEPCO agrees with Staff's position. SWEPCO Second Reply Comments at 9.

CTIA Second Reply Comments

CTIA agrees with PCIA that the Commission adopt the “sign-and-sue” rule to guarantee the reasonableness of contracts. The Commission should expressly assert and exercise authority to modify unreasonable provisions in current and future agreements. Allowing a party to seek review of the reasonableness of an agreement or provision in an agreement “is an appropriate and needed exercise of the Commission’s regulatory authority.” Staff’s position that prior agreements should not be subject to Commission review places those “agreements beyond the Commission’s reach, no matter their unreasonableness, no matter the duress a party may have experienced at the time of execution, and no matter the harm to attachers, consumers and the public interest.” Staff’s proposal would undercut the Commission’s obligation to ensure just and reasonable terms and conditions. Although Staff states Rule 1.05 is consistent with Ark. Code Ann. § 23-4-1003(c), the last sentence goes beyond the language of the statute. CTIA Second Reply Comments at 5-7.

CTIA asserts that Staff’s proposal truncates the scope of authority provided in Act 740. Act 740 gives the Commission authority to hear and determine disputes over implementation of an existing contract. CTIA observes that the Act does not prohibit the Commission from superseding or modifying an existing agreement and argues that the Commission should preserve its authority to determine if the rate, terms and conditions of an agreement are consistent with Act 740 and long-standing regulatory precedent. CTIA points to the FCC’s retention of its “sign and sue” policy in its 2011 Pole Order because Pole Owners “continue to have the potential to abuse their monopoly power in negotiating Pole Attachment agreements.” CTIA states this is the

same as the “common law doctrine where a court will decline to enforce a contract if the provisions are unlawful or unconscionable.” The Commission should be vested with similar power to avoid lengthy contract disputes over unfair terms. CTIA Second Reply Comments at 7-8. Preventing Commission review of agreements “subverts the very purpose of Pole Attachment regulation, and thus, the purpose of Act 740.” The premise of Pole Attachment regulation is that poles are monopoly bottleneck facilities and monopoly power can be abused. Under Staff’s proposal, the Commission could not act on any agreement language that can be shown to be unreasonable. CTIA Second Reply Comments at 8.

A primary purpose of Act 740 is to protect attachers from unreasonable rate, terms and conditions. CTIA states the Commission has a statutory duty to develop rules for effective regulation of Pole Attachments. In order to discharge its duty, “the Commission must retain its authority to review contracts that are unjust and unreasonable.” In addition, Ark. Code Ann. §23-4-1003(b)(1) grants the Commission authority to hear complaints over implementation of existing agreements. CTIA argues it is illogical that the Commission has jurisdiction to hear the complaint regarding implementation of an agreement, but does not have the authority to analyze whether the terms of the agreement are reasonable, or to supersede or modify the terms found to be unreasonable. CTIA Second Reply Comments at 8-9.

PCIA Second Reply Comments

PCIA states that the Commission should ensure the rules flow to existing agreements that have a “change of law” provision that explicitly allows such a change. This type of provision is common in negotiated agreements and parties may have agreed

to accept future changes in applicable law. Also, the parties may wish to agree to these provisions going forward. It is unclear if these provisions would remain in force should the Commission adopt proposed clarifications. PCIA asks for clarification on this issue. PCIA Second Reply Comments at 10.

Commission Finding

In adopting the original PARs, the Commission declined to adopt a “sign and sue” rule. Since that time, pole owners and pole attachers have apparently continued to enter into voluntarily negotiated pole attachment agreements, as few complaints have come before the Commission and in none was the Commission required to establish the rates, terms, and conditions of a pole attachment agreement.¹⁰ If there is a dispute and the parties cannot agree on reasonable rates, terms, and conditions for an agreement, if the public utility fails or refuses to provide access, or if there is a dispute over the implementation of an existing contract, the statute and rules provide a timely complaint proceeding to resolve disputes. Therefore, the Commission sees no need to add a “sign and sue” rule and declines to adopt one at this time.

Rule 1.06 Communications

Pole Owners and Attaching Entities are encouraged to employ consistent and compatible communications systems for the purpose of notification and coordination associated with the Pole Attachments addressed in these rules.

Staff Initial Comments

Staff’s recommended Rules contemplate effective communication between Attaching Entities and Pole Owners to meet the requirements of the Rules. Several

¹⁰ See the Commission’s discussion of filed complaints in *Section 4 - Commission Findings on General Comments, infra*.

parties recommended the use of the National Joint Utilities Notification System (NJUNS), which appears to be working effectively for a number of Attaching Entities and Pole Owners in Arkansas. However, rather than require a specific system, the recommended Rules leave the choice of a system to the parties, who are in a better position to investigate and compare systems. Staff Initial Comments at 7.

AECC Reply Comments

AECC states it appreciates Staff's recognition of the value of communications in requiring notifications and coordination. However, AECC states the proposed Rules do not go far enough. AECC proposes that all Pole Owners and Attaching Entities be required to participate in an objective, third-party communications system. AECC Reply Comments at 37-38.

SWEPSCO Reply Comments

SWEPSCO supports Staff's encouragement of a universal notification system. Communication is the key to productive relationships. SWEPSCO Reply Comments at 3.

Commission Finding

The Commission finds Staff's proposal for Rule 1.06 to be reasonable and in the public interest. The Commission does not see a need to specify any particular notification system at this time, noting that Staff's language is less restrictive and more flexible than imposing a mandatory, third-party communications system.

SECTION 2. ACCESS AND NOTIFICATION

AECC Reply Comments

AECC notes that safety violations are often associated with unauthorized attachments. Because these unauthorized attachments are not subject to utility

oversight, they “create a significant hazard for electric utility systems.” When an attachment application is received, the utility performs an inspection to determine if any work is necessary to make the pole ready for additional attachments. Following the inspection, an estimate is provided to the applicant. The applicant is permitted to install its facilities after the Make-Ready work is completed. The utility also performs an inspection after the attachments are installed to ensure the attachments were installed correctly. These safeguards cannot be performed if the permit process is not followed. AECC Reply Comments at 35.

CTIA Second Reply Comments

CTIA states the rules should have timelines that are “concrete, uniform and enforceable.” Pole owners contend discrete timelines are unfair because they often receive numerous applications within a short time period. Without concrete timelines, an attacher’s ability to provide service would be left to the discretion of the Pole Owner and open-ended timelines provide additional leverage to the Pole Owner in an already unbalanced relationship. CTIA recommends the Commission adopt the timelines proposed by CTIA in its comments. CTIA Second Reply Comments at 5.

Rule 2.01 Contracts and Permits

- (a) Prior to installing a Pole Attachment, the Pole Owner and the Attaching Entity shall have a written contract that specifies the rates, terms, and conditions for the Pole Attachments.**

AECC Reply Comments

AECC states that some electric cooperatives do not allow communications facilities in their ducts or conduits due to safety and reliability concerns, among others.

AECC proposes a change to allow for this prohibition on a nondiscriminatory basis.

AECC Reply Comments at 38.

EAI Reply Comments

EAI commends Staff for its recognition that negotiated agreements promote economic, regulatory, and administrative efficiency and that the value of the negotiated agreement depends on the certainty that comes from the long-standing principle of the sanctity of contracts. Staff's proposed PARs require Attaching Entities have a written contract specifying the rates, terms and conditions for Pole Attachments. EAI proposes an additional subpart to Rule 2.01 that would require Attaching Entities without a written Pole Attachment agreement or written consent to an assignment of an existing agreement to execute a written agreement no more than 90 days from the effective date of the PARs approved in this docket. EAI includes suggested language. EAI states it is critical that the Pole Owner have agreements in place for all attachments to its distribution system. EAI Reply Comments at 3-4.

Joint Commenters Second Reply Comments

Joint Commenters recommend rejection of EAI's proposal requiring entities without a written Pole Attachment agreement to execute an agreement within 90 days following the adoption of new Rules. EAI offers only a vague explanation that the provision is critical from an operational and administrative perspective. Underlying EAI's proposal is the assumption that a long negotiation period is advantageous to Attaching Entities, which is not true. Joint Commenters provide service to their customers and any delay is critical to their business. Second, EAI does not explain what constitutes a "written" agreement. For example, would an expired contract that is

operating under evergreen or other survivability provisions, no longer be a written agreement? Also, there is no explanation on the action to be taken if there is not a written agreement. EAI's proposal is "so vague as to make it unlawful and would appear to grant it unilateral power to harm attachments it deems unfit." Third, a 90 day period is extremely short for negotiating an agreement. This would exacerbate an already superior bargaining position and Joint Commenters believe they would experience more "take it or leave it" rates, terms and conditions. Finally, the provision would undermine the timelines for dispute resolution in Arkansas law. Delays typically arise because of "unjust, unreasonable and discriminatory terms" in Pole Owners proposed agreements. The timeline for a complaint where the parties are unable to voluntarily negotiate an agreement is 180 to 360 days following the complaint filing, which is two to four times longer than the 90 days proposed by EAI. Joint Commenters recommend the Commission reject EAI's proposal. Joint Commenters Second Reply Comments at 10-12.

Joint Commenters respond to AECC's proposed language that allows Pole Owners to prohibit Attaching Entities access to their ducts and/or conduits. Act 740 requires a public utility to provide nondiscriminatory access for Pole Attachments. The definition (Ark. Code Ann. § 23-4-1001(1)(A)) of a Pole Attachment includes access to ducts or conduits. Joint Commenters recommend the Commission reject AECC's proposal. Joint Commenters Second Reply Comments at 12.

PCIA Second Reply Comments

PCIA recommends the Commission reject the proposal requiring that all Attaching Entities without a Pole Attachment agreement to enter into an agreement

within 90 days of the effective date of the revised rules. As drafted, it is unclear if an Attaching Entity with attachments will need to enter into an agreement or whether all Attaching Entities would need to enter into an agreement with all Pole Owners. If an Attaching Entity is not currently attaching in a particular Pole Owner's territory, but may do so at a later date, it is not clear if the rule would preclude future deployment. PCIA Second Reply Comments at 10.

Commission Finding

The Commission finds Staff's proposal to be reasonable and in the public interest and rejects, as inconsistent with the explicit language of Act 740 (Ark. Code Ann. § 23-4-1001(1)(A)), AECC's proposed language allowing utilities to prohibit Attaching Entities access to ducts and/or conduits. Staff's proposed rule requires an Attaching Entity to have a written contract to attach to a pole, duct, or conduit and, because of the availability of the complaints process as a remedy, the Commission declines to specify a timeframe for the execution of such an agreement. The Commission further finds that negotiations between the parties and the availability of the complaints process constitute an approach that is superior to establishing a hard-and-fast deadline and thus declines to adopt EAI's proposal for a 90-day period for establishing an attachment contract or agreeing to assignment of an existing contract.

(b) An Attaching Entity shall have a permit from the Pole Owner, except as provided in Rule 2.01(c), for each Pole Attachment, including a permit covering any Overlapping, subject to the provisions of Rule 2.03 and Rule 2.04.

SWEPCO Reply Comments

SWEPCO supports Staff's proposal that all attachments must be permitted

pursuant to contract. Pole owners must know about and have the opportunity to review new attachments to preserve the reliability of the system and protect workers and the public from unsafe installations. SWEPCO states it can support post-permitting for service drops that do not materially alter the pole loading. SWEPCO Reply Comments at 3.

Joint Commenters Reply Comments

Joint Commenters propose a new Rule 2.01(d) that deals with Overlashing for fiber optic cable. Other Overlashing would continue to be subject to the permitting process. Joint Commenters state that permitting for fiber optic cable is unnecessary because fiber cables are lightweight and do not add any appreciable load to the pole. Fiber optic Overlashing can be done with little, if any, disruption to other pole occupants. As an alternative to permitting, Joint Comments propose a Pole Owner notification process to ensure the Overlashing is performed safely, but in a timely manner. Joint Commenters state that their proposal is a reasonable balance between the pole attachers need for expediency and the concerns of Pole Owners. Joint Commenters at 20-22.

AECC Second Reply Comments

AECC states Overlashing raises important safety and reliability issues and recommends it be subject to the same application approval process as other attachments. The electric cooperative have observed that Attaching Entities are now expanding capacity by bundling one Overlashing on top of another. Early on, 48-fiber strand fiber optic cables were overlashed on outdated coaxial cable or copper wires. Because of an increased demand for fiber, 288-fiber cable is overlashed while keeping

the coaxial and fiber cable in place. Each overlash increases the surface area. This creates more mid-span clearance violations and the likelihood of damage from severe weather events. AECC provides in Second Reply Exhibit AECC-8 an example of how an overlashed line can fall below the minimum NESC mid-span clearance requirement. Overlashing can exacerbate existing safety and reliability problems. A new attachment request provides an opportunity for the Pole Owner to assess existing Pole Attachment conditions and make any necessary changes to ensure the pole is safe and reliable for utility service and attachments. Responsible management of public utility pole plant requires Overlashing be evaluated like any other attachment. AECC Second Reply Comments at 17-18.

Commission Finding

The Commission finds reasonable AECC's rationale for requiring a permit for all Overlashing, including fiber optic cable, given the increased demand for fiber and the associated increase in the surface area of Overlashing. Consequently the Commission adopts Staff's proposal as reasonable and in the public interest.

- (c) An Attaching Entity may install a Service Drop without first obtaining a separate permit for that Service Drop if the Service Drop can be installed by the Attaching Entity in compliance with Rule 3.01(a). The Attaching Entity shall account for and report the installation of Service Drops in compliance with the written contract for service as required by Rule 2.01(a).**

(No contested issues)

- (d) Prior to the assignment, in whole or in part, of an existing Pole Attachment agreement, an Attaching Entity shall notify the Pole Owner of the assignment.**

(No contested issues)

(e) The Pole Owner shall notify all affected Attaching Entities of the sale or transfer of ownership of any pole.

(No contested issues)

(f) The Pole Owner and the Attaching Entity shall exchange and maintain current contact information for both routine business and emergency notification, including but not limited to, name, telephone number, email address, and street address. Participation in a communication system consistent with Rule 1.06 is encouraged to facilitate this information exchange.

AECC Reply Comments

To encourage continuity of Pole Attachment arrangements when contracts are about to expire, AECC proposes to add a Rule 2.01(g) that would require Pole Owners and Attaching Entities to make a good faith effort to negotiate the terms and conditions of a new agreement within ninety days of the expiration of the current contract. AECC Reply Comments at 38.

Commission Finding

The Commission finds AECC's proposal to add a subsection (g) to be reasonable and in the public interest, in that it will encourage continuity of Pole Attachment arrangements when contracts are about to expire. The new subsection shall read: "(g) Pole Owners and Attaching Entities shall make a good faith effort to begin negotiations of the terms and conditions of a new agreement no less than ninety (90) days prior to the expiration of the current contract."

Rule 2.02 Request for Access

(a) Requests to a Pole Owner for a Pole Attachment or Overlapping permit shall be in writing. The Pole Owner may require the applicant to provide the following technical information:

(1) the location of the pole, Duct, or Conduit for which

- the attachment or occupancy is requested;**
- (2) the amount of space requested;**
 - (3) the number and type of attachment for each pole, Duct, or Conduit addition;**
 - (4) the physical characteristics of the attachment or addition;**
 - (5) the attachment location on the pole or in the Duct or Conduit;**
 - (6) the proposed route;**
 - (7) the proposed schedule for construction; and**
 - (8) any other information reasonably required by the Pole Owner and which is necessary to process the request.**

A request containing the information set forth in items (1) – (8) above shall be considered to be a complete request for purposes of Rule 2.02(f).

Joint Commenters Reply Comments

Joint Commenters state that they have no issue with supplying the Pole Owner a complete application prior to the start of the time limits in Rule 2.02(f). The Joint Commenters support the list of items that constitute a complete application except for item (8). Joint Commenters are concerned that the “catch-all” phrase in item (8) could be used by Pole Owners to “delay processing applications and/or force the attacher to pay to gather information that the Pole Owner itself should pay to collect.” The issue becomes more critical as Pole Owners consider and deploy communications facilities in competition with communications attachers. Inclusion of item (8) “completely guts the purpose of specifying the information needed for a complete application. Joint Commenters recommend deleting item (8). Joint Commenters Reply Comments at 22-

23.

PCIA Second Reply Comments

PCIA supports the Joint Commenters' proposal to limit what a Pole Owner can request for an application to be "complete." PCIA Second Reply Comments at 7.

Commission Finding

The information requested by item (8) is limited to other information "reasonably" required by the Pole Owner which is necessary to process the request. Because the PARs do not and cannot foresee all circumstances and identify all items which may be necessary to process a request, the Commission finds that it is desirable to have this flexibility in the PARs. The Commission therefore finds Staff's proposals on Rule 2.02(a) to be reasonable and in the public interest.

(b) An Attaching Entity wishing to overlash facilities shall submit a written request to the Pole Owner identifying the size and type of facilities to be overlash, the size and type of facilities to be added, the poles over which such facilities will be overlash, and when such facilities will be overlash. In cases where a party is seeking to overlash facilities to another Attaching Entity, the party seeking to overlash shall also provide the Pole Owner evidence of the written consent of such host party.

SWEPCO Reply Comments

SWEPCO supports Staff's requirement for a written request to overlash facilities. However, SWEPCO recommends additional language to address cases where a party is Overlashing on a host attacher. In these cases, the Overlashing party must provide the Pole Owner with written consent from the host party. SWEPCO Reply Comments at 4.

Joint Commenters Reply Comments

Consistent with its proposal to add Rule 2.01(d) regarding fiber optic Overlashing, Joint Commenters recommend adding "Except as otherwise provided by

Rule 2.01(d)” to the beginning of the proposed rule. Joint Commenters Reply Comments at 23.

Staff Reply Comments

Staff accepted SWEPCO’s recommended edit, but modified the language to change “different host party” to “another attaching entity.” Staff Reply Comments at 2.

Commission Finding

Consistent with the finding in Rule 2.01(b) that all Overlashing should be subject to permit, the Commission rejects Joint Commenters’ recommendation to add language regarding fiber optic Overlashing and finds Staff’s modified proposal accepting SWEPCO’s recommended additional language to be reasonable and in the public interest.

- (c) The Pole Owner shall identify and account for the incremental engineering costs associated with a request for a Pole Attachment or Overlashing permit and the cost of estimating Make-Ready Work. A Pole Owner may charge an Attaching Entity incremental administrative costs associated with a request for a Pole Attachment or Overlashing permit and the cost of estimating Make-Ready Work, provided that the Pole Owner identifies and accounts for such incremental administrative costs. The Attaching Entity shall pay to the Pole Owner any incremental engineering costs or incremental administrative costs incurred and charged by the Pole Owner in connection with a request for a Pole Attachment or Overlashing permit, regardless of whether the Attaching Entity’s request is rejected or withdrawn by the Attaching Entity.**

AECC Reply Comments

AECC contends this proposed Rule does not appear to cover many of the incremental costs associated with administration of Pole Attachments (staking, construction scheduling, pole transfer management, locates, warehousing and

materials, accounting, and post-attachment inspection). These costs are not included in the pole rental rate, which is intended to recover the costs of owning and maintaining a bare pole. AECC proposes a change to this Rule to recover the costs incurred to process applications, get communications attachments on the pole, and then monitor and manage the attachments. AECC Reply Comments at 38-39.

Joint Commenters Reply Comments

Joint Commenters agree they are responsible for any incremental engineering costs, to the extent they are incremental. The rule requires the Pole Owner to separately account for the incremental administrative costs. Joint Commenters recommend the Pole Owners also be required to demonstrate and provide assurance that these administrative costs have not been included in development of the pole rental rate or other Pole Attachment related fees. The scope of administrative costs has not been defined in the proposed rules and this could potentially include corporate overhead costs which are already included in the Carrying Charge Rate that is included in Staff's proposed formula. Therefore, it is not appropriate to recover these costs as incremental. In addition, the FERC administrative accounts that are included in the formula contain costs that have nothing to do with poles or Pole Attachments. The FCC did not "back out" these costs for efficiency purposes. There are also maintenance costs included in sub-accounts of Account 593 for overhead lines that include many non-pole related expenses. Joint Commenters states its position is consistent with FCC precedent, as the FCC found that electric utilities have not "argued persuasively that recovering these costs through direct reimbursement rather than through the annual rental rate is preferable or reasonable." Joint Commenters state that if the Commission allows Pole

Owners to separately account for and charge for administrative costs, then a “similar effort must be made to remove all non-pole related expenses from the pole formula.” In addition, to ensure the accounting is proper and transparent to Attaching Entities, the Commission should require that all such accounts are available upon request and verified as accurate by the Pole Owners. Joint Commenters Reply Comments at 23-26.

SWEPSCO Second Reply Comments

The Joint Commenters argue that administrative costs associated with non-recurring expenses such as engineering review, inventories, and make ready work should not be recoverable. It appears they are arguing these costs should be recovered through annual pole costs, which are allocated to all Attaching Entities. SWEPSCO argues this is at odds with the goal of allocating costs to the cost causer. SWEPSCO has an established policy of equitably allocating overheads on labor performed. This ensures the cost is recovered from the cost causer, rather than spread among entities not responsible for the costs. SWEPSCO Second Reply Comments at 6.

Joint Commenters Second Reply Comments

Joint Commenters state that AECC proposes to remove Staff's limitation of only allowing recovery of “administrative” and “engineering” costs. This would provide an opportunity for Pole Owners to recover any incremental costs it can identify. AECC contends it should be allowed to recover all costs incurred as Pole Owners. Otherwise, Pole Owners are providing services for free to Attaching Entities. Joint Commenters contend this is not an accurate depiction of cost recovery under the proposed rules and associated formula. As discussed in Joint Commenters' Reply Comments, even including incremental costs under Staff's proposal could, absent a demonstration

otherwise, provides Pole Owners double-recovery. AECC's claim of under-recovery has been repeatedly rejected by independent regulators, which recognize the pole rent formula provides more than adequate recovery. At a minimum, Pole Owners should be required to identify the costs and demonstrate that those categories are not among those already included in the FERC/RUS accounts included in the rental rate or recovered through other attachment-related fees. Joint Commenters recommend the Commission reject AECC's proposed modification. Joint Commenters Second Reply Comments at 12-14.

CTIA Second Reply Comments

CTIA states the Commission should "take affirmative steps to ensure that application, engineering and administrative fees are reasonable and not subject to multiple recovery." CTIA's proposed formula already includes administrative and overhead fees as part of the pole rental rate. Application and engineering fees levied on each "application must not be burdensome or they risk dissuading investment." CTIA Second Reply Comments at 12.

PCIA Second Reply Comments

PCIA states the Commission should prevent Pole Owners from collecting undefined administrative costs. PCIA agrees with Joint Commenters that a lack of defined scope could allow for the inclusion of corporate overhead. If the Commission allows Pole Owners to account for administrative costs, then efforts should be made to eliminate all non-pole expenses from the formula. PCIA Second Reply Comments at 6.

Commission Finding

The Commission finds that the parties' Pole Attachment agreement is the

appropriate mechanism for defining what constitutes incremental engineering and administrative costs. If the parties are unable to reach an agreement, the issue can be brought before the Commission through the complaint process. Therefore, the Commission finds it unnecessary to modify Staff's proposal and finds Staff's proposal to be reasonable and in the public interest.

(d) A Pole Owner may reserve available space on its facilities for future provision of its core utility service, but must permit the use of such reserved space by Attaching Entities on an interim basis until the Pole Owner has an actual need for the space.

AECC Reply Comments

This rule allows Pole Owners to reserve space on a distribution system that was constructed over many decades to accommodate the utility's current and future needs. AECC states that if additional space is needed by a Pole Owner as a consequence of Attaching Entities' presence on the pole, the space should be paid for by the Attaching Entities. The additional space would not have been needed except for the presence of the communications attachments. Some current contracts are silent regarding reservation of space given that the Pole Owner has an entitlement to the space by virtue of ownership. AECC proposes a change to clarify that reservation of space is deemed to exist in the absence of a specific provision in the contract regarding space reservation. AECC Reply Comments at 39-40.

Joint Commenters Reply Comments

Joint Commenters recommend this rule be modified to state the reservation of space is consistent with a development plan that "reasonably and specifically earmarks that space within the current construction schedule, for the provision of its core utility

service.” This is consistent with nondiscriminatory access and just and reasonable rate provisions of Act 740 and the FCC’s and other states’ nondiscriminatory access rules. The Joint Commenters also request the Pole Owner be required to notify the Attaching Entity that the permit being issued is for reserved space. This will allow the Attaching Entity to plan its needs and facilitate any future request to vacate. Joint Commenters Reply Comments at 26-27.

AECC Second Reply Comments

A Pole Owner should not be required to reserve space on its own poles. Arkansas public utilities are obligated to provide safe, reliable and affordable electric service. To meet this obligation, electric cooperatives have historically installed poles with the expectation that they may need to add equipment to the poles in the future. AECC states the right to use the pole “should not be infringed upon in any way, regardless of the capacity expansion’s timing, whether that be one, two, ten or twenty years down the road.” An electric cooperative Pole Owner should not be required to pay to replace a pole if additional space is required due to the presence of an attacher. The cost should be borne by the Attaching Entities. AECC Second Reply Comments at 19-20.

Joint Commenters Second Reply Comments

Joint Commenters disagree with AECC’s proposal to include an assumption that a Pole Owner has reserved and can reclaim space on the pole in the absence of language in the agreement addressing this issue. This is contrary to the statute and current and proposed Rules, which favor a voluntarily negotiated agreement. It is not appropriate for anyone to presume they know why a provision was included or excluded from an agreement. Joint Commenters state that while not binding on the Commission, AECC’s

proposal is in direct conflict with the federal statute, which addresses a Pole Owner's need to expand its poles that have existing attachments. Joint Commenters contend it is clear that Congress intended for the Pole Owner, as the cost causer, to be responsible for the costs of altering or modifying the pole, duct, conduit, or right-of-way except to the extent an Attaching Entity chooses to add or modify its attachment. The industry accepts that an attacher, as the cost causer, pays when its attachment creates a need for a taller or stronger pole. This concept was solidified in the FCC's First Report and Order in 1996. Staff's proposed rules allow for reasonable identification of future expansion by the Pole Owner at the time of the application, which gives the prospective attacher an opportunity to consider its fiscal options before proceeding. Joint Commenters recommend the Commission reject AECC's proposal. Joint Commenters Second Reply Comments at 14-15.

Commission Finding

The Commission finds that the Joint Commenter's notification request is reasonable and modifies the language to include at the end of subpart (d): "The Pole Owner shall provide written notification to the Attaching Entity when a permit is being issued for the use of reserved space." The Commission rejects AECC's proposal to presume a reservation of space when an agreement is silent on the issue. If an agreement is silent on the issue, any interpretation of a specific agreement should be based on the facts of the specific agreement. If the contracting parties desire to address this issue, it should be included in the voluntarily negotiated agreement or proposed to the Commission if a complaint is filed to establish the terms of an agreement.

(e) Within 45 days of written notification that the space is needed by the Pole Owner, the interim Attaching Entity must vacate

the occupied space at its own expense and pay for any modifications needed to maintain the attachment or pay for the expansion of capacity.

Joint Commenters Reply Comments

Joint Commenters propose changing the timeframe from 45 days to 60 days, which is consistent with the notification requirement in Rule 2.05(a). Joint Commenters Reply Comments at 27.

Commission Finding

Changing the notice from 45 days to 60 days is consistent with the notification requirement in Rule 2.05(a). The Commission finds Joint Commenters' proposal for Rule 2.02(e) for 60 days' notice to be reasonable and in the public interest.

(f) The Pole Owner shall approve, deny, or conditionally approve with Make-Ready Work provisions, the request for a Pole Attachment or Overlashing in writing as soon as practical practicable, but in no event later than:

- (1) 14 days after the receipt of a complete request, if the permit request includes 10 or fewer poles;**
- (2) 45 days after receipt of a complete request, if the permit request includes between 11 and 30 poles; or**
- (3) If the permit request includes more than thirty poles, the parties shall work in good faith to negotiate a mutually agreeable timeframe.**

AECC Reply Comments

AECC argues Staff's proposed rule includes deadlines that restrict the ability of the cooperatives to process applications in accordance with their work schedules and based on the completeness of the application received. The cooperatives are not aware that Attaching Entities have experienced a need for the rigid approval deadlines. An

entity could submit 50 requests in a 30-day period and expect instant processing of all the requests. There could also be 50 entities submitting a request with each having the same deadline. AECC states this rule is unfair and not workable. Most of the requests received are smaller orders (2-20 poles). However, processing the application is same for both large and small orders. The process involves “checking for completeness, dispatching the permit application, traveling to and from the site, accessing the estimating system, preparing Make-Ready estimates, preparing letters and communicating with the Attaching Entity, and other tasks.” Attachment requests are processed in the order received. AECC proposes a change that would include a 45-day deadline after receipt of a complete request unless there are extraordinary circumstances or mutually agreed. AECC Reply Comments at 40-42.

Joint Commenters Reply Comments (Except AT&T, CenturyLink and Windstream)

Joint Commenters recommend this rule be modified to “access is granted if it is not denied within the prescribed timeframe,” which is consistent with other state commissions. This will provide certainty for the attacher and an incentive for the Pole Owner to process applications in a timely manner. The Joint Commenters also propose to include a provision that the Pole Owner may conduct a post-construction inspection and if any deficiencies are discovered, the attacher must make corrections within a reasonable period of time. This inspection would not be considered a safety inspection under Rule 3.02. Joint Commenters Reply Comments at 27-28 and Reply Exhibit JC-1 at 64.

Joint Commenters Reply Comments (AT&T, CenturyLink and Windstream)

These Joint Commenters generally agree with other Joint Commenters, but

suggest the Commission use the timeframes for Make-Ready work established by the FCC. While Staff's proposed timeframes are more generous, they may be impractical in that Pole Owners typically process multiple requests from multiple attachers that may be in close proximity to each other. Joint Commenters state that the FCC timeframes are reasonable and recommend the following:

- 45 days for no more than 300 poles or 20 manholes
- 60 days for greater than above but less than 3,000 poles and 100 manholes
- Mutually agreeable timeframe for requests greater than above
- Multiple requests from a single Attaching Entity within a rolling 30-day period are considered a single request

Joint Commenters Reply Comments at 28-29 and Reply Exhibit JC-1 at 64-65.

Staff Reply Comments

Staff accepted CTIA's correction to change "practical" to "practicable." Staff Reply Comments at 2.

SWEPSCO Second Reply Comments

The non-pole owning Joint Commenters urge the Commission to adopt a presumed acceptance provision where the attacher presumes an application is acceptable when the Pole Owner does not respond within the Rules' timeframes. SWEPSCO argues that safe construction of new facilities requires the involvement of the Pole Owner. A Pole Owner may occasionally fail to meet the timeframes, but the remedy should be for the Attaching Entity to make contact with the Pole Owner and not the sacrifice of safety and reliability. If the Pole Owner repeatedly fails to meet the timeframes, then the Attaching Entity can pursue a remedy through the complaint

process. As a Pole Owner, SWEPCO supports the AT&T, CenturyLink and Windstream proposal in Rule 2.02(f) as a fair compromise. SWEPCO Second Reply Comments at 5-6.

Joint Commenters Second Reply Comments

Joint Commenters provide a summary of parties' proposed timelines for processing an application. Joint Commenters contend that regardless of the timeline, an application should be deemed approved if the Pole Owner fails to respond within the appropriate period. Joint Commenters Second Reply Comments at 15-16.

PCIA Second Reply Comments

PCIA agrees with Joint Commenters that an application should be deemed granted if not denied within the prescribed timeline. PCIA Second Reply Comments at 7.

SWEPCO Reply Comments

SWEPCO supports Staff's process for make ready review. However, SWEPCO requests the 14 day timeline be extended to 21 days. SWEPCO states the volume of Pole Attachment applications is inconsistent and it is difficult for a Pole Owner to staff for the additional work required in a 14 day response. In addition, the use of contractors requires additional lead time. SWEPCO Reply Comments at 4.

Commission Finding

The Joint Commenters' suggested timeframes are supported by multiple parties, and no party has opposed those specific timeframes, which also resolve the requests for more time than allowed by Staff's proposal. The Commission therefore finds Joint Commenters' suggested timeframes to be reasonable and in the public interest. The

proposal that an application should be deemed approved if the Pole Owner fails to respond within the appropriate period is denied. The Commission agrees that for reasons of safety and reliability, the Pole Owner should be involved in the construction of new facilities. Accordingly, Staff's proposed language for Rule 2.02(f) is replaced with:

- (f) The Pole Owner shall approve, deny, or conditionally approve with Make-Ready Work provisions, the request for a Pole Attachment or Overlashing in writing as soon as practicable, but in no event later than:
- (1) 45 days after receipt of a complete permit request, for requests including no more than 300 poles or 20 manholes; or
 - (2) 60 days after receipt of a complete permit request, for requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

If the permit request exceeds the preceding limits, the parties shall work in good faith to negotiate a mutually agreeable timeframe.

For purposes of this timeframe, multiple permit requests from a single Attaching Entity within a rolling 30-day period shall be treated as a single request.

Rule 2.03 Make-Ready Work Estimate

- (a) If the Pole Owner grants an application for a Pole Attachment or Overlashing that requires Make-Ready Work, the Pole Owner shall provide a detailed list of Make-Ready Work to include a description of the work, the estimated number of days to complete, and a detailed list of the activities and materials to be used in the Make-Ready Work, along with a cost estimate, within 14 days from the date of approval, as provided for in Rule 2.02(f).**

AECC Reply Comments

AECC proposes a change that would make the detailed list of Make-Ready Work and the cost estimate to be provided within “the same period required to respond under Rule 2.02(f). AECC states that deadlines unnecessarily restrict the ability of public utilities to perform their own work. AECC Reply Comments at 42.

Commission Finding

AECC does not state why the deadline to provide a detailed list of Make-Ready Work and the cost estimate (as opposed to performing the actual Make-Ready Work) varies with the number of poles. The Commission finds Staff’s proposal for Rule 2.03 (a) to be reasonable and in the public interest.

(b) Within 15 days of the receipt of the Make-Ready Work estimate, the Attaching Entity shall provide a written response either accepting the estimate and making payment arrangements as provided in its contract with the Pole Owner, or if the Attaching Entity has any disagreement with the Make-Ready Work estimate or the estimated number of days to complete the work, it shall provide, in writing, a list of any areas of disagreement to the Pole Owner. The Pole Owner will have 15 days from the receipt of the list to provide a response to the Attaching Entity. If the Attaching Entity and the Pole Owner have no substantive disagreements regarding the terms but cannot reach a resolution within 15 days from the date the owner’s response is provided to the Attaching Entity, either party may file a complaint with the Commission pursuant to the terms of this rule.

Joint Commenters Reply Comments

Joint Commenters recommend deletion of the phrase “have no substantive disagreements regarding the terms but.” The filing of a complaint should not be limited to instances of “no substantive disagreements.” Joint Commenters Reply Comments at 30.

Staff Reply Comments

Staff agrees with Joint Commenters and has deleted the phrase “have no substantive disagreements regarding the terms but.” Staff Reply Comments at 1-2.

Commission Finding

The Commission finds Staff’s proposal for Rule 2.03(b), as modified in Staff’s Reply Comments, to be reasonable and in the public interest.

(c) If the Pole Owner approves an application that requires Make-Ready Work, the Pole Owner shall perform the Make-Ready Work at the Attaching Entity’s expense.

AECC Reply Comments

AECC proposes to allow a Pole Owner to require pre-payment for Make-Ready work. AECC Reply Comments, Attachment 1 at 10.

Joint Commenters Reply Comments

Joint Commenters state it is more consistent with industry practice for attachers to perform work on their own facilities that are within the communications space. They propose a modification that would require the Pole Owner to notify attaching parties of the Make-Ready work and that the work would be accomplished at the Attaching Entity’s expense. Joint Commenters Reply Comments at 30-31

Commission Finding

The Commission finds Staff’s proposal for Rule 2.03(c) to be reasonable and in the public interest. The Commission notes that although the parties can agree to something else in a voluntarily negotiated agreement, this rule establishes that the Pole Owner has the ultimate responsibility to perform Make-Ready work which by definition is on the pole itself, not on the attacher’s facilities.

(d) Make-Ready Work shall be completed in a timely manner and at a reasonable cost and as soon as practical-practicable after the date payment is received but not later than:

- (1) 30 calendar days after the date payment is received for requests involving 10 or fewer poles;**
- (2) 45 days after the date payment is received for requests involving between 11 and 30 poles; or**
- (3) For requests involving more than thirty poles or where Make-Ready Work will require more than 45 days from the date payment is received to complete, the Pole Owner and the Attaching Entity shall work in good faith to negotiate other mutually satisfactory conditions to complete the Make-Ready Work.**

AECC Reply Comments

AECC opposes the deadlines for Make-Ready work, as they are unnecessary. The deadlines in Staff's proposed rules would unnecessarily restrict the utility's ability to perform core business activities. Also, these deadlines, like permit processing, do not limit the request to one in any 30-day period. AECC argues there is no reason to believe that smaller requests can be processed faster than normal size requests. Having artificial deadlines disadvantages the Pole Owners. The attacher's Make-Ready work must be evaluated and added to the utility's mix of customer, maintenance and system improvement work. Pole owners should not be required to complete Make-Ready work any faster than utility service work. If Make-Ready work deadlines are considered by the Commission, AECC proposes only those that are manageable by the cooperatives be approved. AECC provides examples of proposals adopted by Oregon, Vermont, and New Hampshire.

- Oregon – If the work requires more than 45 days or has more than 50 poles, the parties must negotiate a mutually acceptable longer period.

- Vermont – A sliding scale that begins with 180 days to complete the estimate and perform the work, unless the parties agree otherwise and except for extraordinary circumstances and reasons beyond the Pole Owner’s control.
- New Hampshire – Most work is required to be completed within 150 days following pre-payment of the Make-Ready work estimates.

AECC proposes changes that would include the same estimated timeframe as Rule 2.02(f); allow a Pole Owner to require pre-payment for Make-Ready work and complete the work consistent with time and cost of other utility work; and require good faith negotiations when the work will require more than 45 days to complete. AECC Reply Comments at 42-43.

EAI Reply Comments

EAI proposes to insert “permit” before the word “requests” in subparts (d)(1), (d)(2), and (d)(3) to clarify that the time periods for completing Make-Ready work refers back to the written “permit request” or “application” required by Rule 2.02 Request for Access. EAI Reply Comments at 4.

SWEPSCO Reply Comments

For the same reasons given for Rule 2.02(f)(1), SWEPSCO requests Rule 2.03(d)(1) be deleted and Rule 2.03(d)(2) changed to 30 or fewer poles. SWEPSCO Reply Comments at 5.

Joint Commenters Reply Comments

Joint Commenters recommend a new Rule 2.03(e), which would allow an Attaching Entity to select a contractor approved by the Pole Owner and proceed with Make-Ready work on its own when a Pole Owner does not timely respond. This is

consistent with the process in the FCC's regulations and supports competition. This will reduce the number of complaints brought to the Commission. Joint Commenters Reply Comments at 31-32.

Joint Commenters Reply Comments (Except AT&T, CenturyLink and Windstream)

Joint Commenters recommend this rule be modified consistent with Rule 2.02(f).

- 60 days (90 days for attachments above the safety space) for no more than 300 poles or 20 manholes
- 75 days (105 days for attachments above the safety space) for greater than above but less than 3,000 poles and 100 manholes
- Mutually agreeable timeframe for requests greater than above
- Multiple requests from a single Attaching Entity within a rolling 30-day period are considered a single request

Joint Commenters Reply Comments at 30 and Reply Exhibit JC-1 at 66.

PCIA Reply Comments

PCIA recommends shortened timeframes for Make-Ready work in order to speed deployment of wireless attachments. For example, the number of poles could be increased to 100 for the 45 day timeframe in Rule 2.03(d)(2). PCIA states the promise of new and faster connectivity is significant to a customer, but can be outweighed by immediate need. PCIA Reply Comments at 11-12.

Staff Reply Comments

Staff accepted CTIA's correction to change "practical" to "practicable." Staff Reply Comments at 3.

AECC Second Reply Comments

AECC responds to the Joint Commenters request for a rule allowing for the Attaching Entity to proceed with Make-Ready work using a Pole Owner approved contractor. AECC states the FCC allows attachers to hire contractors to work in the communications space and not the electric space. For safety and reliability, Make-Ready work in the electric space must be at the discretion of the electric Pole Owner, not the Attaching Entity. AECC Second Reply Comments at 20.

SWEPCO Second Reply Comments

The Joint Commenters seek a right of self-help in cases where parties do not rearrange their facilities within the required timeframes. SWEPCO supports this remedy as long as self-help is not exercised with electric facilities. Work on electric facilities requires coordination among various parties, appropriately skilled workers are used, monitoring power fluctuations on the line, and SWEPCO customers are informed of potential outages. In addition, the FCC ruled out the use of self-help on electric facilities. SWEPCO Second Reply Comments at 6-7.

Joint Commenters Second Reply Comments

Joint Commenters summarize the parties' positions on timelines for Make-Ready work. Joint Commenters continue to support their position. An approach based on the number of poles has been implemented successfully in other areas with other utilities and is an important refinement that will "enhance competition in Arkansas, particularly with respect to prospective commercial accounts that require timely and predictable access to broadband and related communications services." AECC proposes to remove the timelines and instead provide that the work be completed consistent with the Pole

Owner's other work. This would place attachers at the mercy of Pole Owners regarding the placement of facilities necessary to meet its customers' needs. Joint Commenters recommend the Commission reject AECC's proposal and adopt the timeframes and self-help mechanisms advocated in the Joint Comments. Joint Commenters Second Reply Comments at 16-17.

PCIA Second Reply Comments

PCIA supports the proposal to allow attachers to proceed with an approved contractor if the Pole Owner or other attacher does not complete Make-Ready work within the rules' timeframes. This will "incentivize timely Make-Ready work, facilitate deployment, and reduce the number of complaints brought before the Commission." PCIA Second Reply Comments at 7.

Commission Finding

Proposed Rule 2.03(d)(1) refers to "calendar days" while Rule 2.03(d)(2) does not use either "days" or "calendar days." These subsections should be consistent and both refer to "days," consistent with the definition of "Day" in the RPPs.

It is reasonable to have deadlines for Make-Ready Work estimates, just as the approval process for permit applications has deadlines. The deadlines keep the attachment process moving forward. The rules also allow flexibility in meeting the deadlines in Rule 2.03(d)(3). Therefore, the Commission declines to eliminate the deadlines as proposed by AECC. The Joint Commenters (except AT&T, CenturyLink and Windstream) suggest making the deadlines consistent with the deadlines proposed in Rule 2.03(f) (which the Commission has adopted herein). The Commission agrees and adopts those same deadlines for Rule 2.04(d). The Commission finds no

justification to adopt different timelines for Make-Ready Work for different service providers and therefore declines to adopt PCIA's suggestion.

The Commission agrees with EAI that the addition of the word "permit" before the word "requests" in Rule 2.03(d) clarifies the rules. The Commission therefore finds the following language to be reasonable and in the public interest:

- (d) Make-Ready Work shall be completed in a timely manner and at a reasonable cost and as soon as practicable after the date payment is received but not later than:
 - (1) 60 days (90 days for attachments above the safety space) after the date payment is received for permit requests including no more than 300 poles or 20 manholes; or
 - (2) 75 days (105 days for attachments above the safety space) after the date payment is received for permit requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

If the permit requests exceed the preceding limits or where Make-Ready Work will require more than the above-referenced limit of days from the date payment is received to complete, the parties shall work in good faith to negotiate a mutually agreeable timeframe.

For purposes of this timeframe, multiple permit requests from a single Attaching Entity within a rolling 30-day period shall be treated as a single permit request .

The Commission also finds reasonable Joint Commenters' recommendation to allow an Attaching Entity to select a contractor approved by the Pole Owner and proceed with Make-Ready work on its own when a Pole Owner does not timely respond. However, as suggested by AECC and SWEPCO, for safety and reliability concerns, this would only apply to work within the communications space and not apply to work within the electric space. Therefore, Rule 2.03(e) is added as follows: "If Make-Ready Work is not completed by the Pole Owner in a timely manner, the Attaching Entity may

complete the applicable work that is within the communications space using a contractor approved by the Pole Owner. This Rule does not apply to any work that is within the electric space.”

Rule 2.04 Denial of Access

(a) A Pole Owner may deny access for a Pole Attachment on a nondiscriminatory basis where there is Insufficient Capacity or for reasons of safety, reliability, or generally applicable engineering standards as referenced in Rule 3.01(a).

AECC Reply Comments

This rule should be revised to allow denial for an Attaching Entity’s failure to: (1) comply with contractual requirements; (2) correct safety violations; (3) timely transfer facilities; and (4) remove idle facilities. This is necessary to encourage compliance and address past missteps. AECC Reply Comments at 44.

PCIA Reply Comments

PCIA members frequently request and pay for pole replacements and consider pole replacements as routine Make-Ready work. However, the proposed PARs allow a Pole Owner to deny attachments due to “Insufficient Capacity.” Since the costs are borne by the attacher and can improve capacity, the rules should provide a process for pole replacement to increase the capacity for attachments. PCIA Reply Comments at 10.

Joint Commenters Second Reply Comments

Joint Commenters disagree with AECC’s proposal to expand a Pole Owner’s ability to deny access. First, Staff’s proposed rules allow for denial related to safety and reliability so this expansion is redundant. Second, AECC does not provide any objective

criteria for determination of the violations mentioned. The use of subjective criteria would fail to result in nondiscriminatory access as mandated by federal and state laws. Joint Commenters are not aware of any jurisdiction that allows denial of access on subjective standards that are not related to safety. Third, if a party is not complying with the terms or conditions of an agreement or Commission rules, they may file a complaint but cannot immediately deny access based on an alleged infraction. Joint Commenters recommend the Commission reject AECC's proposal. Joint Commenters Second Reply Comments at 17-18.

CTIA Second Reply Comments

CTIA states the rules should allow pole replacement as a means to increase pole capacity. It would be inefficient and wasteful for Pole Owners to refuse to replace a pole with a new taller pole that the attacher pays for and pays rent on. The efficient solution and industry standard is to replace the pole with a taller and/or stronger pole. Any suggestion that replacement requests not be accommodated would give Pole Owners another opportunity to demand premiums. CTIA recommends the Commission adopt the language proposed by CTIA regarding expansion of capacity. CTIA Second Reply Comments at 10-11.

Commission Finding

The Commission finds no need to specifically reference pole replacements within Make-Ready work but recognizes replacements can be a part of Make-Ready work. The Commission finds Staff's proposal for Rule 2.04(a) to be reasonable and in the public interest and notes that in the event the parties are unable to negotiate pole replacement as an option for remedying insufficient capacity, they may seek resolution of the dispute

by filing a complaint with the Commission.

(b) A Pole Owner may deny access for a Pole Attachment to all facilities used exclusively for transmission on a nondiscriminatory basis.

AECC Reply Comments

AECC argues that no transmission poles should be subject to the PARs, including those with distribution under-build. It is extremely difficult to modify transmission poles to accommodate communications attachments. This includes “cost, time to redesign, time to acquire replacement structures, public relation issues, and coordination of transmission refeeds, which can only occur during certain times of the year.” AECC Reply Comments at 44.

Commission Finding

The Commission rejects AECC’s argument that no transmission poles should be subject to the PARs, finding that it has not been shown that transmission with distribution under-build can never be accommodated under the rules. These poles may be addressed on a case-by-case basis. The Commission finds Staff’s proposal for Rule 2.04(b) to be reasonable and in the public interest.

(c) The Pole Owner shall confirm in writing the denial of access for Pole Attachment or Overlapping as soon as practicable, but in no event later than 45 days following receipt of the request.

Joint Commenters Reply Comments

Joint Commenters recommend replacing 45 days with “the applicable timeframe prescribed in Rule 2.02(f).” Joint Commenters Reply Comments at 32.

Commission Finding

The Commission finds Joint Commenters proposal to be reasonable and in the

public interest. This is consistent with the revised timelines adopted in Rule 2.02(f). Rule 2.04(c) is modified to replace “45 days following receipt of the request” with “the applicable timeframes prescribed in Rule 2.02(f).”

(d) The Pole Owner's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to denial of access consistent with the provisions of Rule 2.04(a) and (b).

(No contested issues)

Rule 2.05 Notification

(a) Except as provided for in Rule 2.05(b) or when a regulation, statute, ordinance or other similar legal requirement otherwise provides, a Pole Owner shall provide an Attaching Entity no less than 60 days written notice prior to:

(1) Removal or abandonment of the Pole Owner's facilities, except in situations outside the Pole Owner's control in which case it shall do so as soon as reasonably possible.

Joint Commenters Reply Comments

Joint Commenters recommend adding “as soon as reasonably possible” to the end of this rule. This would clarify that the rule does not negate the Pole Owner’s obligation to notify. Joint Commenters Reply Comments at 32.

Staff Reply Comments

Staff agrees with Joint Commenters and has modified the rule. Staff Reply Comments at 3.

Commission Finding

The Commission finds Staff’s proposal for Rule 2.05(a)(1), as modified to adopt Joint Commenters’ recommendation, to be reasonable and in the public interest.

- (2) Any modification of the Pole Owner's facilities other than routine maintenance or modification in response to emergencies or in situations outside the Pole Owner's control.

(No contested issues)

- (b) If removal or modification of facilities is required because of imminent danger to life or property, a Pole Owner shall have discretion to make that removal or modification without advance notice and shall provide verbal notice and subsequently confirm in writing, whatever action was taken as soon as practicable but in no event later than 10 days thereafter, except in extraordinary circumstances.

(No contested issues)

SECTION 3. SAFETY

Staff Initial Comments

Staff comments that the provision of safe and reliable service is critical and the primary obligation of the Pole Owner and it is important that attachments to poles do not interfere with or impair this obligation. Staff Initial Comments at 11.

AECC Reply Comments

AECC comments that Staff's proposed safety and reliability provisions are inadequate to protect utility facilities and the technicians that work on them and that cooperatives have experienced problems resulting from unauthorized attachments, safety violations, and poor construction practices of Attaching Entities. *Id.* at 6. AECC provides examples of unauthorized attachments and abandonment of facilities experienced by member companies. *Id.* at 16-17. AECC also provided pictures in its Reply Exhibit AECC-6 to demonstrate safety hazards, on a representative basis. *Id.* at

AECC contends that unauthorized attachment and safety issues are felt more acutely in rural Arkansas “due to topography, staffing constraints and a host of other factors.” *Id.* at 36. AECC notes that poles in rural Arkansas are spaced farther apart than those in urban and suburban areas, which require a higher vertical point of attachment to sustain minimum NESC clearances, and that the mid-span sag will be more pronounced on a rural system. Because of the increased sag, AECC asserts that communications attachments will typically be strung at much higher tensions and are attached higher on the pole. AECC states that the most frequent operational problem has been inappropriate stringing and anchoring practices that result in imbalanced mechanical pole loading and premature pole failures. *Id.* at 36-37. AECC provides the results of First Electric Cooperative Corporation’s (FECC) safety inspection since 2010 in Reply Exhibit AECC-7. According to AECC, FECC has inspected about 80% of approximately 60,000 poles with foreign attachments since 2010. Twenty-five percent of the poles had one or more safety violations or maintenance issues, with an average of 1.1 violations per pole. FECC notified each attacher of the violations. FECC’s post inspection found that the corrective work was not performed approximately 50% of the time. *Id.* at 37.

SWEPCO Reply Comments

SWEPCO states that Staff’s rule improves safety and that compliance with applicable codes ensures pole plant is not overburdened, which could cause failure and adversely affect reliability. SWEPCO Reply Comments at 5.

Joint Commenters Second Reply Comments

Joint Commenters strongly object to AECC’s allegations related to the large

number of unauthorized attachments, safety violations, and poor construction practices by attachers. Joint Commenters state they are “vitaly interested in maintaining properly authorized facilities that are in compliance with applicable safety codes.” Joint Commenters Second Reply Comments at 18-19.

Joint Commenters state that it is difficult to respond to AECC’s exhibits because they were provided without identifying information. Joint Commenters assert that outside plant requires regular maintenance due to environmental and other impacts and that AECC’s exhibits paint a distorted picture of reality. Joint Commenters note that when the accusation that attachers are the chief cause of safety violations is exposed to cross-examination under oath, “the allegations are discovered to be unsupported efforts to impose unreasonable costs and burdens on third party attachers.” Joint Commenters maintain that the cooperatives made the same allegations in the 2008 rulemaking. The Arkansas Cable Telecommunications Association responded in 2008 and the Joint Commenters believe the response is equally applicable in this rulemaking. The exhibits must be viewed with the following considerations in mind:

- Electric utilities routinely assign an inordinate amount of blame to attachers.
- Electric utilities apply heightened safety standards to NESC-compliant attachments which creates a violation where none exists.
- Electric utilities falsify violations “that are convenient and economically advantageous to call cable television violations.”
- Electric utilities redefine attachment so that equipment that was placed with utility knowledge but did not require a permit now becomes an unauthorized attachment.

- Electric utilities include drop poles in the count of unauthorized attachments although a permit was not required when the drop was installed.
- In some cases, prior to a formal permitting process, electric utilities allowed attachment without a permit.

Joint Commenters Second Reply Comments at 19-20.

Joint Commenters state that AECC incorrectly blame all violations on attachers and provide examples as Second Reply Exhibit JC-2. Joint Commenters argue that an attacher is often blamed for safety violations by the utility or another entity, such as clearance issues that occur when a new transformer is installed in the safety space. Joint Commenters claim that the Pole Owner then charges the attacher to reestablish proper clearance and that this scenario will become more common as electric utilities become competitors with communications attachers. Joint Commenters state the Rules must recognize this reality and establish balanced rules that do not allow Pole Owners to require attachers to pay for violations they did not create. Joint Commenters Second Reply Comments at 20-21.

CTIA Second Reply Comments

CTIA states that an examination of AECC's claims of unsafe construction practices by attachers are exaggerated and inaccurate. It is simply untrue that communications companies are not concerned about safety. Communications companies invest tremendous amounts of capital in their networks and are motivated to protect those investments and their workers. The ability to attract and retain customers depends on the reliability and continuity of their service. The photos provided by AECC do not tell the entire story. Poles do not exist in a controlled environment and are

subject to factors such as unrestricted access by attachers and others, changes in surrounding land use, weather, and physical deterioration over time. These factors do not excuse the existence of a safety violation, but do help explain them. Fault cannot be determined merely because a photo depicts a violation. CTIA Second Reply Comments at 12-13.

For example, an attacher may install a facility in a safe manner today, but later an additional attachment is installed that places the first attachment out of compliance. That may be what occurred in a number of AECC's photo illustrations, but responsibility cannot be determined from the photographs. The fourth-to-last photograph of AECC-6 shows a communications line, street light, and transformer placed too closely to one another. While the photo shows that appropriate separations have not been maintained, it is not possible to determine which attacher is responsible for the violation. CTIA urges the Commission to focus on finding a solution that ensures availability of poles and that all attachers follow code-compliant construction practices. CTIA is committed to complying with appropriate safety and electric codes. CTIA states that if Pole Owners are willing to collaborate earnestly, "there is no reason wireless attachments cannot be safely and compliantly attached to poles, including pole-tops." CTIA Second Reply Comments at 14.

CTIA states that wireless attachments are routinely placed on poles in a safe manner. Wireless facilities are accorded full access rights with regulated rates, terms and conditions in Florida, Georgia, Missouri, South Carolina, Tennessee, and Texas, all of which rank higher than Arkansas in broadband deployment. To the extent safety concerns exist, they should be addressed the same as any other attachment. CTIA

Second Reply Comments at 17-18.

CTIA states that “as set forth in the attached Expert Report of David J. Marne, industry safety codes and field practices make attachment of many kinds of wireless equipment safe and routine.” NESC rules governing wireless attachments were established in 2001 and since that time thousands of wireless antennas have been attached to the tops of utility poles across the country. The NESC includes clearance requirements and safe installation practices. The NESC rules that protect the general public from falling lines and equipment also apply to wireless attachments and communications equipment attached to electric poles must be attached using the same construction safety factors as energized power lines. Established practices that address lightning concerns and supports used for power line hardware can be used to ensure reliability for pole top attachments. The rules used to work near grounded power line equipment should be applied to pole top attachments. Wireless attachments do not pose any unusual grid-safety or grid-reliability problems. Wireless attachments are commonplace in other states due, in part, “because wireless equipment manufacturing is a mature industry segment that has a successful track record of producing safe, reliable, pole-mountable equipment.” CTIA Second Reply Comments at 18.

Distributed Antenna Systems (DAS) and small cell networks are two common types of attachments crucial to the wireless system. They provide increased coverage and capacity and deeper penetration through efficient use of existing spectrum. CTIA provides examples of projects in Arkansas that use these attachments. CTIA states the Commission can encourage expansion and enhancement of wireless networks by “adopting reasonable Pole Attachment rates, access timelines and non-rate terms and

conditions.” CTIA Second Reply Comments at 19.

PCIA Second Reply Comments

PCIA states it is committed to “ensuring safety in the design, construction, and maintenance of their networks. PCIA’s members invest billions each year upgrading and constructing new facilities. Reliability and continuity are of paramount importance to PCIA. PCIA states the assertions regarding the “purportedly capricious and unsafe nature of communications facility construction are untrue and mischaracterize the state of broadband deployment.” These assertions provide justification for “regulatory overreach regarding safety and inspections.” PCIA’s suggested revisions are included under specific rules. PCIA Second Reply Comments at 8.

Commission Finding

As Staff notes, the provision of safe and reliable service is critical and the primary obligation of the Pole Owner, and it is important that attachments to poles do not interfere with or impair this obligation. Given that Pole Attachments are required to be installed and maintained in compliance with the NESC and NEC, as well as applicable federal, state, or state codes, rules, and regulations, the Commission finds that the following Rules will enhance what appears to be a working process for ensuring safety. The Commission further notes that none of the six complaints filed with the Commission since the initial Rules were adopted in 2008 have resulted in the Commission finding a safety violation. See discussion of the Commission’s history of complaints at *Section 4 - Commission Findings on General Comments, infra*.

Rule 3.01 Safety Responsibilities

An Attaching Entity shall:

- (a) Install and maintain its Pole Attachments and any Overlashing in compliance with:**
- (1) the current edition of the NESC and NEC in effect at the time of construction and the Pole Owner's applicable engineering standards related to safety and reliability in effect at the time of construction; and**
 - (2) the codes, rules or regulations of any federal, state or local governing body having jurisdiction.**

EAI Reply Comments

EAI commends Staff's recognition that to meet the obligation to provide safe and reliable service, the utility must require adherence to the Pole Owner's engineering and safety standards, the basic standards in the National Electric Safety Code (NESC), and any additional standards imposed by governing bodies. In addition, Staff's proposed PARs acknowledge that NESC provides only a minimum standard and does not address specific design or engineering specifications necessary to ensure the reliability of the electric system under local conditions. EAI Reply Comments at 4-5.

AECC Reply Comments

AECC proposes a change that would delete "related to safety and reliability in effect at the time of construction." Compliance with all engineering standards is necessary in order to maintain the integrity of the electric distribution pole plant. Restricting compliance to safety and reliability standards would invite disputes about whether a particular standard is sufficiently related to safety or reliability. AECC Reply Comments at 44-45.

AECC proposes to add Rule 3.01(a)(3) which would require compliance with NESC Heavy Loading standards unless the Pole owner finds Medium Loading is

acceptable. AECC states there are no significant terrain changes at the Missouri and Oklahoma borders that would prevent heavy icing in Arkansas and about one-half of Arkansas could have been placed in the NESC's Heavy Loading area. It has been a long standing practice of cooperatives in North West, North Central, and North East Arkansas to design and construct their facilities to heavy loading standards. Allowing different design standards would nullify the added investments made to ensure greater reliability and public safety. AECC Reply Comments at 45.

Joint Commenters Reply Comments

This rule allows Pole Owners to adopt any construction standard without demonstrating it is for safety purposes or will be applied in a nondiscriminatory manner. Joint Commenters recommend a modification to require Pole Owners to demonstrate to the Commission that any standards exceeding NESC requirements are for safety purposes and can be applied on a nondiscriminatory, prospective basis. This is consistent with FCC rules. Joint Commenters Reply Comments at 33.

PCIA Reply Comments

The PARs should prevent Pole Owners from creating construction standards that unfairly exclude pole-top attachments. Under the FCC Order, to deny a pole-top attachment, a Pole Owner must detail reasons that relate to that specific pole. PCIA urges the Commission to adopt the FCC pole-top framework. *Id.* at 9-10.

AECC Second Reply Comments

AECC responds to the Joint Commenters recommendation that Pole Owners obtain prior approval to implement standards that exceed the NESC. AECC states that the NESC represents the minimum required safety standards. Pole owners are charged

with evaluating the standards to determine if they are sufficient to meet the needs of the specific system. In addition, “NESC is not a design specification or an instruction manual.” Electric cooperatives employ standards that are based on “decades of extensive experience operating those systems.” If the Pole Owner determines that NESC standards are insufficient, they must retain the right to require an Attaching Entity to meet a higher standard. To require a Pole Owner to obtain approval of and justify every existing and new standard would be “unduly burdensome, administratively inefficient and entirely unnecessary.” If the Commission has concerns about safety or reliability standards, there are other mechanisms for that to be addressed and using Pole Attachment rules is not appropriate. AECC Second Reply Comments at 21-22.

Joint Commenters Second Reply Comments

Joint Commenters continue to recommend its modification to AECC’s proposal on any standards exceeding NESC requirements. AECC proposes to apply the company specific standards on a retroactive basis which would require attachers to modify their attachments even though the standard was not in place at the time of attachment. AECC has identified one specific standard that should be included in the Rules – Heavy Loading standards – even though Arkansas is classified by the NESC as Medium Loading. This would require higher ground clearances, different weight parameters, and potentially taller poles, which imposes unnecessary operational and cost burdens on attachers. Joint Commenters state that AECC has not demonstrated the more stringent standard is necessary or justified to address specific safety or reliability concerns in Arkansas. AECC’s proposed changes impose “unfair and inequitable burdens on attaching entities.” AECC’s recommendations would, in effect, require attachers to bear

the costs of a Pole Owner's "upgrades" to its facilities, even when the upgrades have no bearing on safety or reliability of a pole or attachment. The requirements proposed by AECC are unreasonable, discriminatory, and contradict adoption of effective and nondiscriminatory Pole Attachment rules. Joint Commenters recommend the Commission reject AECC's proposal and adopt Staff's proposed rules as modified by the Joint Commenters. Joint Commenters Second Reply Comments at 21-23.

PCIA Second Reply Comments

PCIA recommends the rules require Pole Owners to receive Commission approval when mandating safety standards in excess of the NESC. This will reduce the potential for disputes and complaints before the Commission and harmonize with FCC rules. Proposed Rules 2.04(a) and 3.01(a), taken together, would allow a Pole Owner to adopt any standard without demonstrating it is for safety purposes or that it will be applied in a nondiscriminatory manner. PCIA supports a provision requiring the Pole Owner to provide justification for the standard and that it will be applied in a nondiscriminatory manner on a prospective basis. PCIA Second Reply Comments at 8.

Commission Finding

The Commission finds that Rule 3.01(a)(1) includes compliance with the Pole Owner's applicable engineering standards related to safety and reliability. The Commission further finds that the rules cannot anticipate and address all aspects of engineering standards and that the resolution of disputes regarding such standards is more suitable to the negotiations process leading to a contract. Regarding AECC's proposal to add a new Rule 3.01(a)(3), the Commission notes that if compliance with NESC Heavy Loading standards is part of the Pole Owner's applicable engineering

standards and is necessary for safety and reliability, compliance with this standard is already required by the PARs, and AECC's proposal is not needed. Therefore, the Commission finds Staff's proposal for Rule 3.01(a)(1) and (2) to be reasonable and in the public interest.

(b) Remove idle facilities as soon as is reasonably practicable, but in no event more than 45 days after their replacement. This requirement does not apply when fiber optic cable is authorized to be overlashed to existing copper cable that becomes dormant as a result.

Joint Commenters Reply Comments

Joint Commenters recommend a clarification that this rule would not require an attacher to remove its facilities when a customer moves and discontinues service. The facilities may be used by another customer moving in and ordering service. In addition, this rule should not apply to dormant copper facilities that are overlashed by fiber optic cable. Removal of the copper facilities is not necessary for space or safety reasons and causes an undue operational and financial burden on the attacher. Joint Commenters Reply Comments at 34.

Staff Reply Comments

Staff agrees with the Joint Commenters and has modified the rule to clarify an exception to the removal of idle facilities requirement. Staff Reply Comments at 3.

Joint Commenters Second Reply Comments

Joint Commenters oppose AECC's proposal¹¹ to add a requirement that idle facilities be removed within 60 days of becoming idle due to the difficulty in identifying facilities that are truly idle, as discussed in their Reply Comments. Should the

¹¹ Page 12 of Attachment 1 to AECC's Reply Comments.

Commission accept AECC's proposal, appropriately defining idle facilities becomes more crucial. Joint Commenters Second Reply Comments at 23-24.

Commission Finding

The Commission finds reasonable and in the public interest Staff's modified proposal for Rule 3.01(b), requiring Attaching Entities to remove idle facilities as soon as reasonably practicable, but no more than 45 days after their replacement.

- (c) Repair, disconnect, isolate or otherwise correct any violation that poses an imminent danger to life or property immediately after discovery.

(No contested issues)

- (d) Upon receipt of a Pole Owner's notification of any safety violation, immediately correct a violation that poses imminent danger to life or property and correct other safety violations within 10 days except in extraordinary circumstances or as mutually agreed. All reasonable costs associated with correcting undisputed safety violations shall be incurred by the party responsible for the violation.

AECC Reply Comments

In order to avoid disputes about what a "reasonable amount of time" might be, AECC proposes to require immediate correct of a violation posing imminent danger to life or property and correction of other violations within 30 days. AECC also proposes to allow the Pole Owner to perform work that an Attaching Entity fails to perform and to be reimbursed for any associated costs. To protect Pole Owners from the potential additional liability of communications attachments, AECC recommends that Attaching Entities be required to maintain adequate liability insurance. AECC states that Attaching Entities should be required to guarantee that funds will be available to remove their facilities if they cease to operate or abandon them. AECC Reply Comments at 45-

46.

Joint Commenters Reply Comments

Joint Commenters recommend a modification that would allow an attacher to dispute the safety violation within 10 days. It has been the Joint Commenters' experience that consultants employed by some Pole Owners "grossly overstate the number of safety violations, assign violations to the wrong party, fail to acknowledge that while the NESC may have changed, an attachment is still in compliance with the version of the NESC in effect when it was placed, and do not properly identify the owner of the attachment." In addition, Joint Commenters assert that the costs of correcting a violation shall be the paid by the party responsible for the violation. Joint Commenters Reply Comments at 35.

Staff Reply Comments

Staff accepted part of Joint Commenters suggested modification. Staff agrees the party responsible for the violation should pay the cost to correct. Staff Reply Comments at 3-4.

Joint Commenters Second Reply Comments

Joint Commenters do not object to AECC's proposal to extend the timeframe from 10 to 30 days for safety violations that do not pose an imminent danger. However, the Joint Commenters believe that the exceptions noted in the rule should continue to apply: Pole Owners should also abide by the time requirement, and any system should have a reasonable verification process for assigning the violation to the responsible party. Joint Commenters Second Reply Comments at 24-25.

Joint Commenters do not object to AECC's proposal that the Pole Owner can

perform the work if an Attaching Entity does not repair the violation or fails to comply with the timeframes. However, it is unclear to Joint Commenters what a “fully loaded” rate includes. Joint Commenters suggest AECC’s language be modified to require the Attaching Entity to reimburse the Pole Owner’s “actual and verifiable costs associated with such work.” Joint Commenters Second Reply Comments at 25.

Joint Commenters respond to AECC’s proposal to require attachers to provide insurance and performance bonds, stating that AECC does not explain the basis for needing a performance bond. Joint Commenters contend that this mechanism would compel attachers to pay to correct all plant violations, including those caused by the Pole Owner. Joint Commenters recommend performance bonds and insurance be left for negotiation and not included in the rules. Joint Commenters Second Reply Comments at 25-26.

According to Joint Commenters, AECC’s proposed modifications impose unjustified burdens on attachers, while Staff’s proposed rules balance the interests of Pole Owners and attachers. Joint Commenters recommend Staff’s proposed rules should be adopted and AECC’s proposals rejected. Joint Commenters Second Reply Comments at 26.

Commission Finding

The Commission finds AECC’s proposed modification to change the timeframe for correcting safety violations other than those posing imminent danger from 10 days to 30 days to be reasonable and in the public interest. Accordingly, Staff’s modified proposed Rule 3.01(d) is amended to change “10 days” to “30 days.” The Commission therefore finds reasonable and in the public interest Rule 3.01(d) as amended.

Because the PARs do not preclude an Attaching Entity from disputing the notification of a safety violation, the Commission finds the Joint Commenters' suggested modification unnecessary. In addition, the Commission notes inclusion of the term "reasonable costs" addresses the Joint Commenters' concerns related to the cost of correcting safety violations. As recommended by the Joint Commenters, the Commission finds that AECC's issue related to insurance and performance bonds is more suitable for negotiations leading to Pole Attachment agreements rather than as an amendment to the PARs. If the parties are unable to agree to contract terms, they may file a complaint with the Commission. Staff's proposed Rule 3.01(d) as modified above is found to be reasonable and in the public interest.

(e) Transfer or remove its Pole Attachments from utility poles that have been abandoned by the Pole Owner within 60 days of being notified of such abandonment.

OG&E Reply Comments

OG&E proposes to include language that, after 60 days' notice, would allow a Pole Owner to remove an Attaching Entity's Pole Attachment from facilities that have been abandoned by the Pole Owner at the Attaching Entity's expense. This avoids a situation where the Pole Owner cannot remove abandoned facilities within a reasonable time and return the easement rights to the fee holder, which is required under most easement agreements. OG&E Reply Comments at 1-2.

AECC Reply Comments

Because communications attachments create additional potential liability for Pole Owners, AECC proposes additional rules to require Attaching Entities to maintain adequate liability insurance, repair damage they cause, and guarantee funds will be

available to remove their facilities if they go out of business or otherwise abandon their attachments. AECC Reply Comments at 46.

Joint Commenters Reply Comments

Joint Commenters recommend modification of this rule to allow for unusual circumstances that may require more than 60 days for removal of facilities on an abandoned pole. Joint Commenters Reply Comments at 35-36.

Commission Finding

The Commission finds OG&E's proposed addition to Staff's proposal to be reasonable and in the public interest. Accordingly, the Commission adds the following language at the end of Staff's proposed language: "If Pole Attachments have not been removed after 60 days' notice, the Pole Owner may remove Attaching Entity Pole Attachments at the Attaching Entity's expense." The Commission therefore finds reasonable and in the public interest Rule 3.01(e) as amended.

The Commission finds that AECC's and Joint Commenters' recommended modifications of this rule are more suitable for negotiations leading to Pole Attachment agreements rather than as amendments to this rule. Should the parties be unable to agree to contract terms covering the issues of liability insurance or regarding the need for more than 60 days for removal of facilities, they may file a complaint with the Commission.

Rule 3.02 Safety Inspections

CTIA Second Reply Comments

CTIA states that few issues generate more controversy than safety audits. CTIA asserts that some outside contractors conduct aggressive inspections for the stated

purpose of safety, but often the actual unstated purpose is to shift the cost of plant clean-up to Attaching Entities. CTIA states that safety consultants are sometimes compensated on a percentage-based “bounty” for the plant remediation that attachers pay, creating “incentives that have been at the center of many litigated disputes.” CTIA states that, to the extent AECC’s data comes from such inspections, the “data should be reviewed with considerable circumspection.” CTIA Second Reply Comments at 14-15.

(a) All Attaching Entities shall participate in a joint Safety Inspection with the Pole Owner, with each Attaching Entity bearing its own expense.

EAI Reply Comments

While EAI appreciates Staff’s inclusion of language requiring Attaching Entities to participate in safety inspections, EAI has concerns about the enforceability of the requirement. Unless the PARs promote participation, EAI is concerned there is no incentive for participation, and the Attaching Entities will simply reject the results of the inspection. EAI Reply Comments at 5.

EAI proposes suggested language which would prevent an Attaching Entity from disputing the purpose, scope, results or costs of an inspection if they fail to participate in the inspection. EAI argues this is especially important because the Attaching Entities are not being required to conduct inspections of their own facilities outside of the proposed PARs. EAI Reply Comments at 5.

AECC Reply Comments

AECC states that it is more convenient for Pole Owners and Attaching Entities to conduct inspections individually. This should be an option and the Pole Owner would make the final determination on whether a joint inspection should be conducted. In

addition, AECC agrees with EAI that an Attaching Entity that does not participate in a safety inspection should not be able to dispute its results. AECC Reply Comments at 46-47.

SWEPCO Reply Comments

SWEPCO requests modification of this rule so that safety inspections are at the discretion of the Pole Owner on the basis that no inspection may be necessary if a good relationship exists between the parties. SWEPCO Reply Comments at 5.

Joint Commenters Second Reply Comments

Joint Commenters object to the proposal of EAI and AECC to preclude an attacher from disputing the results of an inspection if the attacher fails to participate. Joint Commenters state that the rule is ambiguous as to what constitutes “participation.” For example, would an attacher be viewed as participating if it was engaged in the planning and reviewed interim and final findings or would it require the more costly step of having a representative be present in the field? Regardless of the participation definition, either Pole Owners or attachers can cause a safety violation and responsibility for the violation must be properly determined. Joint Commenters assert that a non-participating attacher can spot-check violation assignments to verify that the conclusions are generally sound. Joint Commenters recommend rejection of EAI and AECC’s proposal in favor of current and Staff proposed rules, which provide a mechanism for resolving disputes. Joint Commenters Second Reply Comments at 29-30.

PCIA Second Reply Comments

PCIA recommends the Commission reject the proposal that an Attaching Entity’s

failure to participate in a safety inspection results in an inability to dispute the results. An Attaching Entity should be able to dispute the findings regardless of participation. PCIA Second Reply Comments at 9.

Commission Finding

The Commission finds that the requirement to participate in a Safety Inspection procedure under Staff's proposed Rule 3.02(a) protects the interests of both Pole Owners and Attaching Entities in a balanced fashion. The parties may negotiate varying levels of participation on a case-by-case basis to enable flexibility in the inspection process. The PARs provide a complaint mechanism for resolving disputes regarding the purpose, scope, results, or costs of a joint Safety Inspection and the failure of an Attaching Entity to participate in the inspection. The Commission declines to adopt EAI's and AECC's proposal that would prevent a dispute if the Attaching Entity did not participate. This rule requires participation of the Attaching Entity to some degree. Accordingly, Staff's proposal for Rule 3.02(a) is thus found to be reasonable and in the public interest.

(b) Pole Owners shall establish safety inspection schedules so that the inspection of all of the Pole Owner's Arkansas facilities will be completed no more often than every 3 years, but in no event may the inspection of these facilities take longer than 5 years.

Staff Initial Comments

Staff states that the parties have informally indicated that this timeframe is consistent with their current inspection schedules. Staff Initial Comments at 11.

AECC Reply Comments

AECC proposes a modification to allow for more frequent inspections than every

three years when circumstances warrant, such as unauthorized or dangerous attachment activities. AECC Reply Comments at 47.

Joint Commenters Reply Comments

Joint Commenters disagree with the requirement that an inspection be completed within five years on the basis that it is inconsistent with current practice and the time and expense involved. Joint Commenters note that inspections may be spread out to accommodate work load, as well as financial considerations. Joint Commenters suggest the time for completion be mutually agreeable between the parties, without a specific Commission-determined timeframe for safety inspections, which could override arrangements in existing contracts. In addition, the record for pole safety in Arkansas has not demonstrated a need for mandatory inspections. Joint Commenters suggest in the alternative to reduce the frequency to no more than every 5 years or allow mutual agreement. Joint Commenters Reply Comments at 36-37.

SWEPCO Second Reply Comments

SWEPCO agrees with Joint Commenters that safety inspections should be at the discretion of the Pole Owner, because many Attaching Entities construct and maintain their facilities in compliance with NESC and SWEPCO's internal standards. SWEPCO states that mandatory inspections would incur unnecessary cost for both the Pole Owner and Attaching Entities. However, SWEPCO maintains that Pole Owners must retain the discretion to require inspections where there is a concern about the safety of the Attaching Entity's plant. SWEPCO Second Reply Comments at 7.

Joint Commenters Second Reply Comments

Joint Commenters recommend the Commission reject AECC's proposal for safety

inspections on an entity-by-entity basis because it is inefficient and ineffective. Generally, Joint Commenters state that a thorough inspection requires review of all attachments, including those of the Pole Owner. Joint Commenters cite clearance issues as an example where all attachments must be reviewed in order to assign responsibility. Joint Commenters add that allowing the Pole Owner to pick which Attaching Entity will be subject to a safety audit could lead to more disputes at the Commission. Joint Commenters agree that safety inspections should be discretionary rather than mandatory, however, they do not agree with AECC's proposal to have inspections more frequently than every three years, unless the more frequent inspection is at the Pole Owner's expense. Joint Commenters Second Reply Comments at 27.

PCIA Second Reply Comments

PCIA states that if a Pole Owner determines inspections should occur more often than once every three years, the Pole Owner should be responsible for the cost of the extra inspection unless jointly agreed to and within the standards of the Commission. PCIA Second Reply Comments at 9.

Commission Finding

Based upon responses of the parties on this issue after questioning by the Commission, and upon Staff's clarification of the meaning of Rule 3.02(b) during the public hearing, (T. 1026), the Commission finds that Staff's proposed language should be modified to read as follows: "Pole Owners shall establish safety inspection schedules so that an inspection of all of the Pole Owner's Arkansas facilities will be completed at least every 5 years, but not more frequently than every 3 years." The Commission notes that the parties can agree to different timeframes in their negotiations toward a

contract. As modified, the Commission thus finds Rule 3.02(b) to be reasonable and in the public interest.

(c) Prior to engaging in a Safety Inspection, the Pole Owner shall provide 180 days advance written notice to the Attaching Entities.

(No contested issues)

(d) All of the Pole Owner's inspection costs associated with a Safety Inspection shall be paid by the Attaching Entities and the Pole Owner. The Pole Owner shall be responsible for 25% of its inspection costs and the remaining 75% of the Pole Owner's inspection costs shall be paid by the Attaching Entities on a pro-rata basis, based on the number of poles each Attaching Entity occupies.

Staff Initial Comments

Because the Pole Owner receives some benefit from the safety inspection, the Pole Owner's cost will be shared by the Pole Owner and Attaching Entities with the Attaching Entities paying on a pro-rata basis, based on the number of poles occupied.

Staff Initial Comments at 12.

AECC Reply Comments

AECC maintains that, if there were no Attaching Entities on the pole, there would be no need to inspect the Attaching Entities' facilities. Therefore, AECC proposes that Attaching Entities pay all of the Pole Owner's costs associated with the safety inspection. AECC Reply Comments at 46-47.

SWEPCO Reply Comments

SWEPCO states that if a Pole Owner elects to perform a safety inspection due to concerns with an attacher's construction and maintenance practices, the attaching party should bear the entire cost of the safety inspection. SWEPCO Reply Comments at 5.

Joint Commenters Reply Comments

Joint Commenters believe safety inspections provide benefits to both Pole Owners and attachers and the costs should be shared equally. Joint Commenters propose that the Pole Owner would be responsible for 50% and the attachers would share the other 50%, in proportion to each entity's number of poles occupied. Joint Commenters Reply Comments at 37.

SWEPCO Second Reply Comments

SWEPCO disagrees with the proposal to allocate 25% of the cost of inventories and safety inspections to the Pole Owner. In addition, SWEPCO disagrees with the Joint Commenters proposal for the Pole Owner and Attaching Entities to share the cost 50%-50%. SWEPCO notes that Attaching Entities repeatedly rely on the FCC rules for authority. However, according to SWEPCO, where the FCC allocates 100% of the inventory and safety inspection cost to the Attaching Entity, the Joint Commenters do not embrace FCC policy. In this case, SWEPCO argues, the Attaching Entity is the cost causer and the costs should not be allocated to non-responsible parties. SWEPCO Second Reply Comments at 7-8.

Joint Commenters Second Reply Comments

In support of equally sharing the cost of inspections, Joint Commenters argue that this is a balanced approach because the Pole Owners occupy more space; inspection of the Pole Owner's facilities involves at least as much time as required for other facilities; and Pole Owners benefit from the inspections. To ensure the rules for safety inspection are effective and nondiscriminatory, Joint Commenters recommend the proposal for 100% assignment of cost to attachers be rejected. Joint Commenters

Second Reply Comments at 27-28.

Commission Finding

On balance, given the positions of the parties on this issue, with recommended assignments of Safety Inspection costs to Attaching Entities ranging from 100% to 50%, the Commission finds some sharing of costs to be justified and that Staff's proposal in Rule 3.02(d) to assign 75% of costs to Attaching Entities is reasonable and in the public interest.

- e) Prior to conducting a Safety Inspection, the Pole Owner and the Attaching Entities shall work in good faith to negotiate mutually agreeable terms of the Safety Inspection.**

(No contested issues)

Rule 3.03 Pole Attachment Audits

- (a) All Attaching Entities shall participate in a joint Pole Attachment Audit with the Pole Owner, with each Attaching Entity bearing its own expense.**

Staff Initial Comments

Because the Pole Owner receives some benefit from the Pole Attachment audit, the Pole Owner's cost will be shared. Staff Initial Comments at 12.

EAI Reply Comments

For the same reasons discussed under Rule 3.02, EAI proposes to include the same additional language which would prevent an Attaching Entity from disputing the purpose, scope, results or costs of an inspection if they fail to participate in the inspection. EAI Reply Comments at 6.

AECC Reply Comments

AECC proposes the same modifications as for Rule 3.02 Safety Inspections. AECC Reply Comments at 47.

Joint Commenters Second Reply Comments

Joint Commenters state that AECC and EAI suggest that the same modifications proposed for safety inspections apply to Pole Attachment audits. Joint Commenters reiterate the comments on safety audits as they relate to pole audits as well and recommend the Commission reject AECC and EAI's proposal. Joint Commenters Second Reply Comments at 30-31.

CTIA Second Reply Comments

As with safety inspections, attachment audits are commonly subjected to the same percentage-based compensation system. These audits are "commonly laden with inaccurately tabulated items expressly included for the purpose of inflating the number of attachments." Some of the items incorrectly tabulated include: "counting of service, drop or lift poles, counting bonding wire to a shared ground, counting multiple attachments with the space allocated to the communications company, and defining certain non-attachments as "attachments," including even pedestals mounted on the ground merely near a pole." CTIA states the Commission should critically view this evidence and give it little, if any, weight. CTIA Second Reply Comments at 15.

Commission Finding

The Commission finds that the requirement to participate in an Audit under Staff's proposed Rule 3.03(a) protects the interests of both Pole Owners and Attaching Entities in a balanced fashion. The parties may negotiate varying levels of participation

on a case by case basis to enable flexibility in the audit process. The Commission finds that the proposed PARs provide a complaint mechanism for resolving disputes regarding the purpose, scope, results, or costs of a joint Pole Attachment Audit and the failure of an Attaching Entity to participate in the Audit. The Commission declines to adopt EAI's and AECC's proposal that would prevent a dispute if the Attaching Entity did not participate. This rule requires participation of the Attaching Entity to some degree. Staff's proposal for Rule 3.03(a) is thus found to be reasonable and in the public interest.

(b) Pole Owners shall establish Pole Attachment Audit schedules so that the audit of all of the Pole Owner's Arkansas facilities will be completed no more often than every 3 years, but in no event may the audit of these facilities take longer than 5 years.

Joint Commenters Reply Comments

Joint Commenters disagree with the requirement that an audit be completed within five years. This is inconsistent with current practice and the time and expense involved. Audits may be spread out to accommodate work load, as well as financial considerations. Joint Commenters suggest the time for completion be mutually agreeable between the parties. Joint Commenters also recommend the Commission not adopt a specific timeframe for audits. Current contracts may already contain schedules and this would have the effect of overriding any existing arrangements. Joint Commenters recommend the rules be revised to refer to poles rather than facilities. The term "poles" is more precise and is consistent with the scope and intent of the rules. Joint Commenters Reply Comments at 36-37.

Commission Finding

Consistent with the Safety Inspection addressed in Rule 3.02(b) above, the

Commission finds that Staff's proposed language for Rule 3.03(b) should be modified to read as follows: "Pole Owners shall establish Pole Attachment Audit schedules so that an Audit of all of the Pole Owner's Arkansas facilities will be completed at least every five years, but not more frequently than every 3 years." The Commission notes that the parties can agree to different timeframes in their negotiations toward a contract. As modified, the Commission finds Rule 3.03(b) to be reasonable and in the public interest. The Commission declines to adopt Joint Commenters suggestion to replace "facilities" with "poles" as the latter is more narrow and not the only term used in the rules.¹²

(c) Prior to engaging in a Pole Attachment Audit, the Pole Owner shall provide 180 days advance written notice to the Attaching Entities.

SWEPCO Reply Comments

While SWEPCO understands the need for parties to budget for audits, it is not always feasible to give a 180 day notice. SWEPCO requests this be changed to a 90 day notice. SWEPCO Reply Comments at 6.

Joint Commenters Second Reply Comments

Joint Commenters agree with Staff's proposed 180 day notice. The timeframe is sufficient and necessary for Attaching Entities to prepare for the audit and include it in their budget and work plans. Joint Commenters disagree that a shorter period is appropriate and recommend the Commission reject SWEPCO's proposal. Joint Commenters Second Reply Comments at 30.

Commission Finding

Consistent with the timeframe adopted for the Safety Inspection, the Commission

¹² See, e.g., Rule 2.02(f).

finds Staff's proposal for Rule 3.03(c) for the Pole Attachment Audit to be reasonable and in the public interest.

(d) All of the Pole Owner's audit costs associated with a Pole Attachment Audit shall be paid by the Attaching Entities and the Pole Owner. The Pole Owner shall be responsible for twenty-five percent (25%) of its attachment audit costs and the remaining seventy-five percent (75%) of the Pole Owner's attachment audit costs shall be paid by the Attaching Entities on a pro-rata basis, based on the number of poles each Attaching Entity occupies.

SWEPCO Reply Comments

SWEPCO argues the pole rental is designed to equitably share pole costs among the cost causers. An audit is undertaken for the sole purpose of assuring that a Pole Owner is recovering these costs. It is inequitable to assign 25% of the cost to Pole Owners when the audit is undertaken to recover costs that should have been paid by the attacher if it had properly permitted its facilities. SWEPCO Reply Comments at 6.

Joint Commenters Reply Comments

Joint Commenters believe audits provide benefits to both Pole Owners and attachers and the costs should be shared equally. The Pole Owner would be responsible for 50% and the attachers would share the other 50% in proportion to each entity's number of poles occupied. Joint Commenters Reply Comments at 37.

Commission Finding

On balance, given the positions of the parties on this issue, with recommended assignments of Pole Attachment Audit costs to Attaching Entities ranging from 100% to 50%, the Commission finds that some sharing of costs of such audits is reasonable and that Staff's proposal in Rule 3.03(d) to assign 75% of such costs to Attaching Entities to

be reasonable and in the public interest.

- (e) Prior to conducting a Pole Attachment Audit, the Pole Owner and the Attaching Entities shall work in good faith to negotiate mutually agreeable terms of the Pole Attachment Audit.**

(No contested issues)

- (f) Additional equipment that is normally required by the presence of a Pole Attachment in the Attaching Entity's Usable Space and equipment placed in the Unusable Space, which is used in conjunction with the Pole Attachment and to the extent is allowed by the Pole Owner, is not an additional Pole Attachment for rental rate purposes.**

SWEPCO Reply Comments

SWEPCO requests modification of this rule to allow for the parties to negotiate charges for cabinetry and power supplies installed on the pole. SWEPCO currently charges for these and believes doing so is equitable due to the additional space and loading consumed by such facilities. SWEPCO Reply Comments at 6-7.

Joint Commenters Reply Comments

Joint Commenters recommend a modification to specifically list some items found on poles that are not "Pole Attachments" and not subject to a Pole Attachment fee. Joint Commenters Reply Comments at 37-38.

Commission Finding

The Commission finds Staff's proposal for Rule 3.03(f) to be reasonable and in the public interest. As stated in Staff's proposal, any equipment placed in the Unusable Space would not be an additional Pole Attachment for rental rate purposes. However, the proposed rule does not prohibit other charges for this equipment. The charges for equipment used in conjunction with a Pole Attachment that is allowed by the Pole Owner to be placed in the Unusable Space should be negotiated by the parties.

SECTION 4. RATE FORMULAS AND MODIFICATION COSTS

(Appendix A to Staff's proposed Rules sets forth Rate Formulas to be used by the Commission in the event that Pole Owners and Attaching Entities are unable to reach negotiated agreements and seek Commission resolution of issues under Act 740 by filing a complaint under Section 5.)

Staff Initial Comments

Staff states that the proposed rate formula would determine the maximum Pole Attachment rate, in recognition that the primary purpose of the pole is to provide utility service and to ensure that each Attaching Entity pays a reasonable portion of the revenue requirement associated with poles. Staff Initial Comments at 13.

In establishing a rate formula for Pole Attachments, Staff points to its reliance upon the cost causation and benefits-received principles embodied in other rates established by the Commission. The recommended formula uses historical costs in determining the pole costs, which is consistent with the ratemaking policies and principles associated with the Commission's establishment of just and reasonable utility rates. Staff Initial Comments at 12-13.

According to Staff, the investment and expenses used in the proposed formula are obtained or derived from publicly-available accounting records, noting that the use of historical embedded costs is consistent with the Commission's ratemaking principles. Staff asserts that historical embedded cost is a reasonable methodology for deriving the revenue requirement for poles. Staff Initial Comments at 13-14.

Staff observes that during the informal collaborative workshop, two divergent views emerged regarding its proposed rate formula: Staff's proposed formula allocates

either too much or too little of the pole cost to Attaching Entities. Staff's proposed formula allocates approximately 38% of the revenue requirement of poles to Attaching Entities (18.9% to each of the two presumed Attaching Entities) and the remaining 62% to the Pole Owner. This allocation of the revenue requirement recognizes that utility services are the primary purpose of the poles and assigns a reasonable amount to the Attaching Entities. Staff Initial Comments at 14-15.

Staff does not support either the FCC cable formula or FCC telecom formula, noting that both of these "rate mechanisms are designed to encourage the expansion of cable and telecommunications networks into unserved or underserved areas." Staff states that its objective is to establish rates that reflect the cost of providing access to poles consistent with Ark. Code Ann. §§ 23-4-1001 *et seq.* Staff contends that the FCC cable and telecom formulas do not allocate adequate costs to Attaching Entities and that other cost allocation methodologies advocated by some parties in Docket No. 08-073-R and during the collaborative process in this docket allocate too much of the cost to Attaching Entities. Staff Initial Comments at 15.

During the informal workshop, some parties suggested that Staff's proposed rate formula would produce rates that are significantly higher than current rates and would produce a financial hardship on the Attaching Entities and their customers. Staff responds that there are at least four different methodologies currently used to calculate Pole Attachment rates in Arkansas under existing Pole Attachment agreements – RUS electric cooperative formula, FCC Cable formula, FCC CLEC (telecom) formula, and incumbent local exchange carriers (ILEC) joint use agreements. Staff notes that each of these formulas produces a different rate and, therefore, adoption of a single maximum

Pole Attachment rate formula will likely produce a rate different than the rate currently paid by an Attaching Entity under such an agreement. Staff emphasizes that no rates are being set in this proceeding. The proposed rate formula will be used to determine the maximum rate only when parties fail to negotiate a rate and a complaint is filed with the Commission. Staff contends that the appropriate forum to determine whether or not the maximum rate is appropriate is in each complaint proceeding. Staff Initial Comments at 15-16.

AECC Reply Comments

AECC notes that when it passed the Pole Attachment Act, the United States Congress (Congress) excluded poles owned by electric cooperatives from FCC regulation and, by extension from the FCC rate formulas. AECC asserts that Congress recognized that the electric cooperatives are in the best position to set Pole Attachment rates since many of their members also receive cable services. According to AECC, Staff's proposed rate formula is a variation of the IOU-focused FCC rate, which applies to IOU electric utilities and incumbent local exchange carriers (ILECs). AECC expresses concern that starting with an "artificially low" FCC-based rate formula fails to completely allocate the cost of the pole based on cost causation and benefits received. *Id.* at 4-5.

AECC argues that Staff's proposed formula assigns costs to Pole Owners that are directly attributed to or caused by Attaching Entities or are equally beneficial to both Pole Owners and Attaching Entities. According to AECC, this creates a subsidy for for-profit entities at the expense of the electric cooperatives' retail rate-paying members. AECC Reply Comments at 5. AECC proposes as an alternative for setting rates for

electric cooperatives one of the formulas approved by the public service commissions in Delaware, Indiana, and Maine or the American Public Power Association (APPA). AECC asserts that the formulas used by these jurisdictions allocate costs in a manner that more closely matches cost causation with benefits received in the electric cooperative context. *Id.* at 5-6.

According to AECC, when Congress passed the 1978 Pole Attachment Act, which began FCC regulation of Pole Attachments, the cable industry was in its infancy. Cable companies claimed Pole Owners had a superior bargaining position to cable systems and abused that position to the detriment of the cable industry. The Pole Attachment Act established a maximum rate that IOUs and ILECs could charge. The rate was intended to spur growth in the cable industry. AECC Reply Comments at 7-8. However, AECC asserts that the cable industry is no longer in its infancy and a subsidy is no longer necessary. *Id.* at 13. To support its contention that a subsidy is no longer needed, AECC provides financial information on Comcast, Cox, AT&T, Inc. (AT&T) and CenturyLink, Inc. (CenturyLink). In addition, AECC contends that the rates these attachers charge their subscribers are higher than ever and have increased at a rate double that of electricity. AECC states that when it requested Arkansas-specific information from Attaching Entities, the majority either refused to provide information or provided incomplete or evasive responses. According to AECC, subsidization comes in many forms, including but not limited to, “artificially low rates, taller and sturdier pole accommodations, unauthorized attachments, unreported safety violations, and abandonment of unused facilities.” *Id.* at 14-16. In addition, AECC asserts that there are hidden costs of providing Attaching Entities access to poles, which exacerbate the

subsidy. AECC provides a listing of some of these hidden costs. AECC Reply Comments at 18-19.

AECC states the electric cooperatives are not IOUs and should not be treated as such since they operate as not-for-profit corporations. Any excess revenue earned by the cooperatives is returned to the member-owners in the form of capital credits. Any net profits from annual Pole Attachment rates are passed through to members in the form of reduced rates for electric utility service. AECC argues that the reduction can only occur if the income is sufficient to cover the costs to “install, administer, monitor, manage, and often rectify the unauthorized or unsafe attachments of Attaching Entities.” AECC Reply Comments at 8-9.

AECC argues that there is no correlation between lower rates and comprehensive broadband deployment. As an example, AECC points to the failed attempt to pass Arkansas House of Representatives Bill 1798 (HB 1798) in the 2015 regular session. AECC states that it and its member cooperatives attempted to reach a mutually-beneficial solution that would have traded subsidized rates in exchange for universal broadband service for cooperative members. AECC states that it was told that rates were not a major impediment to the deployment of broadband and thus no deal could be made to exchange lower rates for guaranteed deployment. *Id.* at 19-20. AECC also provides an example from a Virginia case. *Id.* at 20-21. AECC asserts that for-profit Attaching Entities want to attach to facilities paid for by utility ratepayers at little to no cost. If an FCC based formula is adopted, an unnecessary subsidy will continue at retail ratepayer expense. The cost of a system sufficient to accommodate Attaching Entities will be shifted to Pole Owners without a guaranteed or reciprocal benefit. *Id.* at 21-22.

According to AECC, Staff's proposed rate formula calculates the annual cost of owning and operating its poles by multiplying the net cost of a bare pole by the carrying charge rate. The annual cost is then multiplied by a space factor, which is the percentage of the pole costs that are assigned to the Attaching Entity. Pole costs are divided into usable and unusable portions, based on the percentage of the total pole height that the usable space and unusable space occupy. The costs associated with usable space are allocated based on the amount of space occupied by attachments. The costs associated with unusable space are allocated one-third to the Pole Owner and two-thirds to both the Pole Owner and Attaching Entities. AECC Reply Comments at 10-11.

AECC states that attachments to poles for IOUs and ILECs are subject to regulation in all fifty states and the District of Columbia, either by the FCC or the state. In most states attachments to electric cooperative poles are not regulated. AECC provides examples of formulas used by states that do regulate attachments to electric cooperative poles. AECC argues that these states recognize the inherent value of the pole distribution systems to Attaching Entities and the costs the Attaching Entities avoid by not having to construct their own pole distribution systems. AECC explains the formulas used by Delaware, Indiana, Maine and American Public Power Association. AECC Reply Comments at 22.

Delaware Rate Formula:

AECC states that Delaware's rate formula, which was adopted in 1989, calculates the annual cost of owning and operating poles in a manner similar to Staff's proposed formula. The difference is in the allocation of costs among the attachers. Under the Delaware formula, the support component of the pole is

allocated equally among all attachers, in recognition that it is of equal value to all Attaching Entities. In addition, AECC states that this recognizes that Attaching Entities would have to incur significant pole costs if they had to build their own system. The forty-inch safety space is allocated equally among the communications Attaching Entities. Under the Delaware formula, the Attaching Entity is presumed to occupy one foot of space plus its share of the safety space. If there are three attachments on the pole (including the Pole Owner), 30.2% of the pole costs would be allocated to each communication Attaching Entity. AECC Reply Comments at 22-24.

Indiana Rate Formula:

AECC states that in 2006 Indiana adopted a methodology similar to the Delaware formula. Again, the calculation of the annual cost of owning and operating poles is similar to Staff's proposed formula. Indiana allocates 100% of the unusable space equally among all attachers, including the Pole Owner. The Indiana formula assumes a forty-foot pole and only counts as usable the amount that is actually used by each attacher. If there are three attachments on the pole (including the Pole Owner), 31.25% of the pole costs would be allocated to each communication Attaching Entity ($12.5/40$). AECC Reply Comments at 24-25.

Maine Rate Formula:

AECC notes that the main difference between the Maine formula and Staff's proposed formula is not the calculation of the costs, but the allocation of the costs to Attaching Entities. The Maine formula uses two different allocations. The first allocates the assigned space, which is similar to Staff's usable space,

based on the percentage of assigned space each Attaching Entity uses. The remainder of the pole is common space, similar to Staff's unusable space. The common space is allocated on a stand-alone cost formula. Under this formula, a comparison is made of the costs each Attaching Entity would incur to build a stand-alone pole line. Maine determined that an electric utility's distribution system would need poles that are taller, stronger, and more closely spaced, when compared to poles used only by telephone or cable companies, and that telephone companies would have greater pole requirements than cable companies. AECC states that under the Maine formula, on a presumptive 37.5-foot pole, total pole costs would be allocated 23.0% to the cable attacher, 32.4% to the telecom attacher, and 44.6% to the electric utility. AECC Reply Comments at 25-26.

American Public Power Association (APPA) Rate Formula:

AECC states that APPA is a service organization for the nation's more than 2,000 community-owned (municipal) electric utilities, which serve more than 48 million people. The APPA formula recommended for use by municipal utility members is based on a formula adopted by the City of Seattle, and approved by a Washington State superior court in 1998.¹³ The APPA formula allocates costs associated with assigned space and common space separately. The 40-inch safety space is considered common space. The common space is allocated equally among all Attaching Entities. The assigned space is allocated based on the percentage used by the Attaching Entity. Under the APPA formula, presuming a pole with a height of 37.5 feet and three Attaching Entities, each Attaching Entity

¹³ See TCI Cablevision of Washington, Inc. v. City of Seattle, No. 97-2-02395-5SEA, Slip Opinion Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Sup.Ct., King County).

would be allocated 27.0% of the pole costs. AECC Reply Comments at 26-27. AECC states that the Washington court found this methodology reasonable, recognizing that each attacher on the pole benefits equally from the support space. The court also found that the safety space was primarily for the benefit of Attaching Entities and that it would be reasonable to allocate this space to Attaching Entities other than the Pole Owner. AECC states that the court specifically rejected the FCC formula as not a measure of reason and that it was the result of Congressional compromise that was intended to help a “fledgling cable industry.” In addition, the court found the Seattle methodology benefited the cable company “because the expense of owning a portion of the poles or the expense of building its own set of poles is greater than the expense of renting space from Seattle.” AECC Reply Comments at 27-28.

AECC provides a table that compares the percentage of costs allocated to Attaching Entities, assuming three attachers and a 37.5 foot pole (Indiana is based on a 40 foot pole).

	FCC Cable	Pre-2011 FCC Telecom	General Staff	APPA (Seattle)	Arkansas Co-ops	Delaware	Indiana	Maine
Percentage	7.4%	16.9%	18.9%	27.0%	31.9% (Telco) 29.2% (Cable)	30.2%	31.25%	42.4% (Telco) 23.0% (Cable)

AECC Reply Comments at 28.

AECC also provides a table comparing the cooperatives’ proposed formula to Staff’s proposed formula.

	Three Attachers (Electric, Telecom, Cable)	Two Attachers (Electric, Telecom)	Two Attachers (Electric, Cable)
Staff's Proposed Formula	Electric – 62.2% Telecom – 18.9% Cable – 18.9%	Electric – 73.0% Telecom – 27.0%	Electric – 73.0% Cable – 27.0%
Cooperative's Proposed Formula	Electric – 38.9% Telecom – 31.9% Cable – 29.2%	Electric – 54.9% Telecom – 45.1%	Electric – 57.6% Cable – 42.4%

AECC Reply Comments at 29.

AECC requests “the Commission adopt an electric cooperative-specific rate formula that allocates the pole costs to the causer of those costs and based on data that is representative of electric cooperatives’ actual costs.” AECC Reply Comments at 29.

SWEPCO Reply Comments

SWEPCO states that Staff's proposed formula assigns 55% of the unusable space to the Pole Owner and argues that the formula should not assign 1/3 of the Unusable Space to Pole Owners. The Pole Owner should be included in the number of attachers and the space allocated equally, noting that all parties enjoy the benefit of the unusable space and that removing the 2/3 multiplier would equitably split the unusable space. SWEPCO Reply Comments at 7.

Joint Commenters Reply Comments

Joint Commenters recommend that the Commission adopt the FCC cable formula and include clarifying language to properly address zero or negative pole investment situations. They argue that Staff's proposed formula produces unreasonably high rates that are contrary to the requirements of Act 740. Staff's formula will negatively impact the deployment and upgrade of plant and the accessibility and affordability of new, advanced services by consumers. Joint

Commenters cite Patricia Kravtin's report as detailing that Staff's formula over-allocates costs, introduces complexity and non-uniformity, and produces unreasonable rates, which negates the effective regulation requirement of Act 740. Joint Commenters Reply Comments at 38-39.

Joint Commenters provide an overview of Staff's proposed formula, noting that it allocates significantly more cost to attachers than the FCC's cable formula or its current telecom formula. They argue that Staff failed to incorporate changes adopted by the FCC to its telecom formula and inappropriately reclassifies safety space from usable to unusable. Joint Commenters Reply Comments at 40.

Joint Commenters state that in 2011 the FCC modified its telecom formula to essentially produce rates in the same range as its cable formula. Under the FCC's old telecom formula 16.89% of the costs were allocated to the attacher. The FCC's cable formula allocates 7.4%. Joint Commenters state that the FCC's telecom formula change was to better align costs with the costs caused by attachers and to promote competition and broadband deployment. Ms. Kravtin explains that when the old telecom formula was adopted, the technology involved a new wire being attached by a new provider and there was an expectation of a greater number of attachers on the pole. Ms. Kravtin points to the divergence between telecom and cable rates as a major catalyst for the FCC changing its telecom formula. Joint Commenters Reply Comments at 40-41.

Staff's proposed formula reclassifies 3.33 feet of space from usable (under FCC formula) to unusable, which increases unusable space to 27.33 feet from 24 feet. This modification allocates 18.86% of pole cost to the attacher under a three attacher scenario and nearly 27% when there are two attachers. According to Joint Comments,

under the three attacher presumption, Staff's formula allocates 155% more in costs to the attacher than does the FCC cable formula or current telecom formula, which has been found by agencies and courts to be just and reasonable and fully compensatory.

Joint Commenters provide a table comparing cost allocation factors.

Formula (3 Entities, 37.5' Pole)	Usable Space	Cost Allocation Factor	Proposed Staff % Increase
Staff Formula	10.17'	18.86%	
Current Telecom Formula	13.5'	7.43%	153.84%
Cable Formula	13.5'	7.41%	154.52%

Joint Commenters Reply Comments at 41-42.

Joint Commenters believe the cable formula is a more effective ratemaking mechanism because it will lead to fewer disputes and is uniform. The "number of attacher" input is exclusively controlled by Pole Owners and cannot be readily verified by the attacher, which undermines the purpose of a formula and effective regulation. Ms. Kravtin explains that tracking the number of attachers "adds a level of complexity and arbitrariness to the Staff Formula." Joint Commenters Reply Comments at 43.

Joint Commenters state that an "overwhelming number of other state commissions that have considered alternative rate formulas" have adopted the cable formula. Joint Commenters provide two tables comparing Pole Attachment rates for the cable formula and Staff's proposed formula.

Based on Arkansas Cooperative Information

Formula	Allocation %	Rate/Pole
Cable Formula	7.41%	\$4.49
Staff Formula		
2 Attachers	26.96%	\$16.34
2.5 Attachers	22.10%	\$13.39
3 Attachers	18.86%	\$11.43

Based on Arkansas IOU Information

Formula	Allocation %	Rate/Pole
Cable Formula	7.41%	\$5.29
Staff Formula		
2 Attachers	26.96%	\$19.26
2.5 Attachers	22.10%	\$15.79
3 Attachers	18.86%	\$13.48

Based on the above information, Joint Commenters assert that Staff's formula results in unjust and unreasonable rates and over-recovery for Pole Owners. The cable formula fully compensates Pole Owners, "as demonstrated by FCC and court (including United States Supreme Court) precedent, other state commission decisions adopting the formula, as well as states exercising jurisdiction over Pole Attachments for cooperative and municipally-owned utilities." Ms. Kravtin writes in her report that the FCC found that under economic and legal principles, a subsidy does not occur if the rate for the service covers all costs caused by the service. Joint Commenters Reply Comments at 44-46.

Joint Commenters provide excerpts from a North Carolina rate dispute case that found the cable formula established the appropriate rate.¹⁴ Joint Commenters Reply Comments at 47-48.

Joint Commenters state that Staff's reliance on the same formula as it did in the original 2008 rulemaking ignores critical developments since 2008. Ms. Kravtin points out that there has been growth in the number of applications and importance of access to broadband, noting that Arkansas is behind neighboring states in broadband availability and accessibility. Joint Commenters Reply Comments at 48-49.

Joint Commenters recommend the Commission adopt the FCC cable formula and

¹⁴ *Rutherford EMC v. Time Warner Entertainment et al.*, N.C. Bus. Ct. (May 22, 2014) at 15.

provide a redline version in Reply Exhibit JC-1.

CTIA Reply Comments

CTIA recommends that the FCC's cable formula be used in determining annual rental rates and that the Commission ensure "its rate regulations apply to wireless attachments in a non-discriminatory manner, consistent with federal policy." CTIA stresses that an important modification is clarification that wireless attachers are not for "non-exclusionary pole use for risers, and similar facilities," arguing that a foundational principle of the cable formula is that "if an attachment excludes other uses of the space the attachment occupies, only then should the attacher pay for additional space beyond what is presumed under the formula." CTIA recommends that the presumption for a wireless attachment be one foot of space and contends that if an attachment does not prevent the use of space by others, such as a riser, then the space the riser uses should not be chargeable. CTIA notes that this approach is consistent with neighboring states and would assess wireless attachments for space used without discriminating against other attachers. *Id.* at 11-12.

CTIA recommends that the Commission adopt rules that provide wireless attachers with access to utility infrastructure on a non-discriminatory basis, which can be accomplished by adopting the FCC's cable formula. This would "promote efficient and rapid deployment of mobile broadband services to the benefit of Arkansas's consumers and economy." *Id.* at 12-13.

PCIA Reply Comments

PCIA supports a single rate for attachments based on the FCC's cable rate formula, noting that in its 2011 Order the FCC followed the recommendation in the

National Broadband Plan to establish rates that are low and as uniform as possible. This methodology “allows for cost-recovery for Pole Owners and aligns attachment fees in a technology-neutral way.” *Id.* at 12-13.

AECC Second Reply Comments

AECC states that in interpreting “effective regulation,” the Joint Commenters point to the FCC cable rate as the benchmark, providing FCC decisions and the opinion of Ms. Kravtin to support their interpretation. However, AECC asserts that FCC Pole Attachment regulation was originally designed to cure problems and alleged bad practices associated with IOUs and to subsidize a fledgling industry in the late 1970s. The cooperatives were specifically excluded by Congress. AECC argues that by excluding the cooperatives, Congress recognized the cooperatives were not “bad actors in need of correction, nor were they an appropriate party through which to perpetuate a new subsidy.” When considering the FCC precedent cited by the Joint Commenters, the fact that the cooperatives were expressly excluded must be taken into consideration. AECC Second Reply Comments at 3.

If the Commission does adopt a FCC-based rate formula, AECC argues that the electric cooperatives should be exempt from its application. First, AECC states, there is nothing in the record establishing abuses by an Arkansas electric cooperative that would justify applicability of a formula design to combat an IOU-based problem. In addition, AECC argues that adoption of a subsidized rate formula will not ensure universal broadband deployment across rural Arkansas. AECC Second Reply Comments at 4.

Second, AECC contends that “FCC-based rates designed for IOUs are not a one-size-fits-all approach,” noting that Congress decided long ago that electric cooperatives

were effective at self-regulation based on their ownership and governance structure. In addition, AECC states that a similar rationale was used by the Commission in excluding cooperatives from the Arkansas *Affiliate Transaction Rules*. Based on the same reasoning, AECC and the electric cooperatives request exclusion from any FCC-based rate formula. Such regulation would be inconsistent with Ark. Code Ann. § 23-4-1003. AECC Second Reply Comments at 4-5.

AECC notes that the Joint Commenters point to a case in North Carolina as support for a FCC-based formula, but asserts that at the time the case was decided “the North Carolina statute *required* courts to consider FCC rules and regulations in determining whether a rate was just and reasonable.” In addition, AECC notes, the finding was based on the fact that the court had other credible evidence before it to rebut the reasonableness of the FCC cable rate. AECC states that Arkansas does not have a statute requiring consideration of the FCC rules and regulations in determining if a rate is just and reasonable and that it has provided credible evidence that the FCC cable rate is neither just nor reasonable. AECC argues that the North Carolina case is not relevant to the application of a rate formula to electric cooperative poles. AECC Second Reply Comments at 5-6.

AECC states that Joint Commenters also rely on the opinions of Ms. Kravtin, who argues that effective regulation should be based on a competitive market and that the FCC cable formula is the best approximation of such a market. But, AECC notes, Ms. Kravtin does concede that an inherent flaw is that no market exists for Pole Attachment rates. Therefore, AECC argues, it is theory and speculation, rather than facts, data, or evidence, which creates a correlation between a competitive market and the FCC cable

rate. AECC urges the Commission to make a finding similar to the Washington Court of Appeals, which found Ms. Kravtin's opinions were based primarily on "theoretical analysis of economics and public policy" and therefore, were "unreasonable and impractical as it relates to this case."¹⁵ AECC Second Reply Comments at 6-7.

If the Commission does adopt an FCC-based rate for cooperatives, AECC recommends the Commission adopt Staff's proposed formula as modified by AECC in its Reply Comments. AECC's modifications ensure "costs assigned solely to Pole Owners are not costs (a) directly attributable to or caused by other Attaching Entities, or (b) equally beneficial to both Pole Owners and Attaching Entities." Otherwise the proposed rules risk promoting subsidies in favor of for-profit entities at the expense of the cooperatives' retail ratepayers. AECC also notes the contention of CECC in its Reply Comments that such subsidies create the potential for an unconstitutional taking related to both space on the pole and unanticipated use of an easement. AECC Second Reply Comments at 7.

AECC states that the Joint Commenters argue broadband deployment is hampered by high Pole Attachment rates. However, AECC states that it and its members offered, and continue to support, discounted rates for Attaching Entities' commitment to provide global broadband service in all electric cooperative service territories. AECC notes that this offer was rejected by Joint Commenters in the 2015 Arkansas legislative session. AECC argues that the rejection confirms the finding by the Virginia State Corporation Commission that "customer density, and not attachment rates, was the primary determinant of whether rural areas have broadband access,"

¹⁵ See, *Pub. Util. Dist. No. 2 of Pacific County v. Comcast of Wash. IV, Inc.*, 184 Wn. App. 24, 43-44, 336 P.3d 65, 75, 2014 Wash. App. LEXIS 2442, *17-18 (Wash. Ct. App. 2014).

noting that this can be seen in Arkansas on the map provided in Second Reply Exhibit AECC-1, which shows availability of broadband in Arkansas and the service territories of Arkansas' public utilities.

AECC points out that EAI receives the FCC cable rate for attachments, but "no discernable difference exists in broadband deployment within its territory." AECC also notes that there is a school district in EAI's service territory that is installing its own towers and fiber facilities to support broadband in their school because AT&T would not make the initial investment. AECC Second Reply Comments at 8-9. On a national basis, AECC states, the Joint Commenters data demonstrates that employing the FCC cable rate will not have an impact on broadband deployment. The national average of citizens without access to broadband is 17%. Fifteen states regulate attachments for cooperatives and seven apply the FCC cable rate. Of the seven states, "four had populations without access to broadband well in excess of the national average," with Vermont's 80% being the highest. AECC proposes a rate similar to those in Delaware, Indiana, Maine and Washington (the City of Seattle). Of those four states, three had access greater than the national average (Delaware 3%, Washington 4%, Indiana 14%, and Maine 22%). AECC notes that the average in rural areas for these four states is also better than the national average. AECC states that although cooperative members would appreciate broadband access in their areas, there is no correlation between low Pole Attachment rates and broadband deployment. AECC Second Reply Comments at 9-11.

Joint Commenters Second Reply Comments

Joint Commenters continue to recommend the FCC's cable formula, stating that

it produces rates that are just and reasonable and fully compensatory to Pole Owners. Staff's proposed formula would produce excessive rents that are over 3.5 times more than the cable formula. Using AECC's presumption of two attachers, Pole Owners would receive 26.96% of their pole costs from attachers. AECC contends that Staff's proposal does not provide sufficient compensation because of their "unique cooperative business model." However, Joint Commenters respond, while the cooperatives may have a business model different than IOUs, there is nothing unique about their ownership of poles. Just like IOUs, they are owners of essential facilities that attachers need and their pole costs are similar. Joint Commenters state that AECC offers conclusory assertions and unsupported claims about not being fully compensated, "which have no basis in fact, law, or economics." Joint Commenters Second Reply Comments at 31-32.

Joint Commenters state that they have demonstrated in their Reply Comments through the Kravtin Report, FCC and judicial precedent, and certified state decisions that the cable formula is just and reasonable and fully compensatory to Pole Owners. AECC's contention that Pole Owners subsidize attachers and hidden costs exist in accommodating attachments is meritless. Joint Commenters assert that the cable formula has consistently been recognized by courts and commissions to reimburse Pole Owners for marginal costs and a proportional share of fully allocated costs. The cite Ms. Kravtin assertion that it is widely acknowledged that "a rate is not a subsidized rate if it covers the provider's marginal costs." Joint Commenters contend that use of the cable formula, as opposed to a more complicated formula using the number of attachers, reduces the likelihood of disputes between parties and complaints filed at the

Commission because of the ease of placing readily available data into the cable formula. The cable formula eliminates the disputes related to the number of Attaching Entities. Joint Commenters Second Reply Comments at 32-33.

Joint Commenters argue that AECC's contention of "hidden costs" is rebutted by Ms. Kravtin in her Second Reply Report (Second Reply Exhibit JC-1). The types of costs asserted to be "hidden" fall into three categories, none of which are appropriately considered "hidden." The costs are (1) recoverable from attachers through Make-Ready and other direct reimbursement fees, through indemnification provisions in pole agreements, or through the rental rate, including administrative and maintenance costs; (2) direct costs associated with the utilities' core business and recoverable from ratepayers; or (3) relate to costs that could be avoided through improved rules and procedures for efficient joint use of poles. Joint Commenters contend the cable formula meets Act 740's requirement of a just and reasonable rate and effective regulation. They assert that the electric utilities fail to provide evidence that the cable formula, along with all incremental costs paid, will result in utilities subsidizing attachers. Joint Commenters Second Reply Comments at 33-34.

Joint Commenters disagree with AECC and SWEPCO's proposal to eliminate the $\frac{2}{3}$ factor applied to unusable space in Staff's formula and divide unusable space equally among the attachers and Pole Owner. They note that electric utilities typically occupy at seven times the space as an attacher and that dividing the unusable space equally fails to recognize the disproportionate benefit the electric utility has by occupying more of the available space. Resolving this issue can be accomplished by adopting the cable formula, which eliminates the number of attachers. Joint

Commenters note that the cable formula assigns unusable space in proportion to the amount of occupied space and is therefore both just and reasonable and simple and equitable in determining the amount of unusable space. Joint Commenters Second Reply Comments at 34-35.

Joint Commenters state that the vast majority of states adopting the cable formula recognize that the proper measure of a “just and reasonable” rate for Pole Attachment rent is not the benefit or value to the Attaching Entity, but rather the cost of the Pole Owner to provide access. If the Pole Owner fully recovers its marginal cost, neither the Pole Owner nor the ratepayer suffers. Joint Commenters contend that the additional value sought by electric utilities on top of the cable rate does not reflect real cost to which they are entitled. They assert that Staff’s formula is flawed because Staff assumed “ratepayers and attachers share in the cost of utility plant investment, and mistakenly based its formula partly on a “benefits-received” principle.” Joint Commenters Second Reply Comments at 36.

Joint Commenters state that Ms. Kravtin points out that the utilities’ argument of an equal sharing of costs is “based on a number of erroneous and/or unproven premises.” An equal assignment is not economically efficient or equitable, just as an equal share of common office space to all tenants regardless of space occupied would not be equitable. Joint Commenters Second Reply Comments at 36-37.

From an operational perspective, Joint Commenters argue there is nothing equal about the access to a pole between the attachers and the Pole Owners. Attaching entities do not have “the key rights of ownership, planning, and control of how the pole network is deployed, used, or managed, and the ready access to poles without limiting terms and

conditions and delays.” Allocating 100% of unusable space, whether or not including the Pole Owner, does not recognize the greater amount of space occupied by the electric utility. Also, Joint Commenters assert that the premise that the customers of core utility service are inherently a different population from customers of attachers’ communications services is erroneous. They are often one and the same and will benefit from lower prices and more widespread availability of advanced broadband services. Joint Commenters state that the proposal to equally allocate costs would be unprecedented because no other certified state, except Delaware, allocates unusable space equally without an adjustment for the ownership rights and privileges of the owner. Joint Commenters note that “[a] review of rates charged by Pole Owners in Delaware confirms that the utilities do not apply the deficient and outdated Delaware formula but instead general apply rates consistent with the FCC Cable Formula.” Joint Commenters Second Reply Comments at 45.

Joint Commenters state that Staff and AECC have proposed to expand the amount of unusable space by including the safety space, which is only used by the Pole Owner. Allocating the unusable space based on the number of attachers will only cause disputes on the number of attachers and will have a magnified effect on rural communications operators and their customers where there are fewer attachers and more attachments required to serve the customers. This negative consequence shows the unreasonableness of dividing unusable space on a per attacher basis advocated by Staff, SWEPCO, and AECC. Under the cable formula, Joint Commenters note, payment for usable and unusable space is proportional and tied to the amount of space occupied. Under the cable formula, the Occupied Space ratio (one foot of space divided by the total

amount of usable space) is applied to the cost of the pole and the carrying charges. This approach is more straightforward than Staff's modified telecom formula approach that assigns 1/3 of the cost to the Pole Owner and the remaining 2/3 is shared by all attachers, including the Pole Owner. In addition, the per foot rate in the cable formula's per foot rate can easily be charged for each one-foot increment required by the attacher. Joint Commenters argue that it simplifies both the rate calculation and billing processes, being easily understood and applied, and that it is preferable to a more administratively burdensome individual company-specific rate calculation that occurs with a floating value in the rate formula. Joint Commenters Second Reply Comments at 36-41.

Joint Commenters assert that the cable formula produces the most just and reasonable attachment rates and recommend the Commission adopt this formula. However, they note, if the Commission adopts a rate formula with a per capita allocation methodology, it should be the current FCC telecom rate formula. In addition, they argue, the 2/3 factor should be retained and the safety space should be considered usable space, reiterating that Staff's modified formula is based on the old FCC formula. Joint Commenters note that the FCC implemented additional cost reduction factors because the old formula "produced rates in excess of efficient rate levels and were detrimental to the public interest." Joint Commenters Second Reply Comments at 43-44.

Joint Commenters state that the pricing formulas proposed by AECC focus on increasing rental payments. To this end, they note that AECC points to a small minority of approaches that increase rental rates. The proposed formulas, they assert, are

“modeled after discredited (and disregarded) state Pole Attachment formulas (Delaware and Maine); a rate formula adopted by the City of Seattle that does not even apply to investor-owned utilities or cooperatives; and a rent formula applicable only with respect to pole rents between two ILECs and one electric cooperative in Indiana.” These formulas generally follow the approach of allocating the cost of unusable space on a pro rata basis rather than a proportional basis. Joint Commenters note that each of these approaches has been rejected by the vast majority of states that regulate Pole Attachments. Joint Commenters’ review of rates in Delaware confirms that utilities generally apply rates consistent with the FCC cable formula. The APPA formula is based on an appellate case in Washington, which held that if “Seattle had decided to use the FCC ‘pro rata method of allocation,’” (i.e., the Cable Formula) then that method “could also be reasonable.” Joint Commenters point out that the Washington Utilities and Transportation Commission is certified and uses the FCC cable formula to determine rates for IOUs in Washington. Likewise, they note, Indiana’s Commission is not certified and the cable formula is applied to IOUs in that state. The formula referred to by AECC is a rate decision by the Indiana Utility Regulatory Commission (IURC) that involves Pole Owners, an electric cooperative, and two ILECs. The IURC allowed a higher rate because the cable formula resulted in a rate lower than either Sprint or SBC Indiana recommended. Joint Commenters note that the Maine formula is an “avoided cost” model that attempts to duplicate what it would cost each attacher to build its own distribution system, arguing that the formula “is so fraught with problems and is so complex” that it is not used by electric companies and attachers. They state that Maine utilities and attachers use settlement rate, noting that the level of detail required is not

used in FERC Form 1 reporting and that litigation ensued when utilities attempted to impose the formula. Ultimately the Joint Commenters state that the Maine parties agreed to settle because complete adjudication of the issue would involve considerable resources and expense to the parties and the Maine Commission. Joint Commenters Second Reply Comments at 44-47.

Joint Commenters state that AECC's proposed modifications to certain formula presumptive values should be rejected because their comments contain no actual or specific supporting data. The Kravtin Second Reply Report contains a number of reasons why they should be rejected. Joint Commenters state that the Commission should be wary of making selective changes to the widely-accepted presumptive values. Joint Commenters argue that any changes should be done as part of a comprehensive analysis of all presumptive values in the formula. For example, they note, Staff's formula has a presumptive rate of return of 8%, which is generous and is based on the capital markets over the last several years. They observe that is especially true for cooperatives, which are eligible for subsidized low-cost debt financing and zero-cost capital in the form of retained patronage capital. Joint Commenters note that the IURC decision cited by AECC found that an appropriate proxy for a cost of equity for cooperatives would be the cooperatives' long-term cost of debt. They state that an analysis of the average cost of debt for Arkansas cooperatives suggests a rate of return in the range of 4.5%, which is almost half Staff's presumptive value. Joint Commenters argue that the approach proposed by AECC is neither just nor reasonable. Joint Commenters Second Reply Comments at 48-49.

CTIA Second Reply Comments

CTIA recommends that the Commission adopt the FCC cable formula to ensure reasonable rates for wireless attachers, which the courts have found to be fully compensatory and not a subsidy. CTIA contends that AECC's contention that the cable formula is a subsidy is not supported in the "laws of economics, or in the laws of jurisprudence of the United States." Attaching Entities pay well in excess of the incremental costs associated with their attachment to the poles, including a fair return on the utility's investment. CTIA quotes the Supreme Court where it that concluded that a rate which provides recovery of fully allocated cost, include cost of capital, is not confiscatory.¹⁶ CTIA Second Reply Comments at 20. Under the cable formula, CTIA notes, Attaching Entities not only pay an annual rental fee, but also any Make-Ready charges associated with rearrangements and pole modifications to accommodate the attachment. CTIA asserts that Pole Owners are frequently better off economically after accommodating Attaching Entities. CTIA Second Reply Comments at 21.

According to CTIA, the Delaware, Maine, Indiana, and American Public Power Association (APPA) formulas suggested by AECC are "anomalous, distinguishable and/or seldom used." CTIA contends that the Delaware, Indiana, and Maine approaches exist on the books only, and CTIA is not aware that any of these approaches have been tested in a contested proceeding. The APPA approach has not been adopted by a single court or regulatory agency. CTIA notes that the formula on which APPA is based, originally adopted by the City of Seattle, Washington, is currently being reevaluated by the Washington Utilities and Transportation Commission in a

¹⁶ *FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987).

rulemaking on pole attachments. CTIA Second Reply Comments at 21.

PCIA Second Reply Comments

PCIA states that the record supports adopting the FCC cable formula which most closely resembles a competitive market. The cable formula “which has been adopted in many other states exercising reverse preemption as well as in FCC-rule states, can be uniformly applied, making administration easier and reducing burdens on the Commission.” Staff’s formula is based on an out-of-date FCC telecom formula, which has been revised by the FCC and rejected by a number of state commissions in favor of the cable formula. In addition, PCIA notes, the FCC is currently evaluating adjustments to its new formula to “ensure rates more closely match the cable formula regardless of the number of Attaching Entities.” PCIA recommends the Commission adopt the fully-compensatory cable formula. PCIA Second Reply Comments at 3-4.

PCIA argues that subsidy comments are unwarranted and have been repeatedly rejected by federal and state agencies. Also, PCIA reiterates that the taking of private property argument has been raised and rejected in other states and at the federal level, including the U.S. Supreme Court. As explained in the Kravtin report, the cable formula produces a subsidy-free rate that fully compensates the Pole Owner. PCIA states that the notion of regulated rates subsidizing telecommunications providers is an illogical concept, considering that the Pole Owner would bear the entire cost of the pole construction and maintenance if there are no Attaching Entities. Also, PCIA argues, characterizing the cable rate as a subsidy for cable television service “ignores the current reality of both wireline and wireless broadband deployment utilizing pole attachments.” PCIA states that suggesting there is no link between broadband deployment and Pole

Attachment rates ignores research findings to the contrary by the expert federal agency on communications. PCIA asserts that favorable broadband policies will only become more important as demand increases for data at faster speeds grows. PCIA Second Reply Comments at 4-5.

PCIA recommends that the rate be on a per attachment basis and supports CTIA's assertion that a wireless attachment be presumed to be one foot of space. When an attachment exceeds the one foot of space, the record supports a rate determined on actual space occupied. PCIA argues that the "Commission should follow FCC precedent and determine the rate by actual space occupied when an attachment uses extra space to the exclusion of attachment by another party." PCIA Second Reply Comments at 5-6.

Staff Reply Comments

Staff continues to recommend its proposed rate formulas. Staff states that its proposed formulas are a reasonable mechanism and a fair allocation of the Pole Owner's pole revenue requirement between the Pole Owner and Attaching Entities. Staff states that its recommended rate formulas ensure that each Attaching Entity pays a reasonable portion of the revenue requirement associated with the poles. Staff Reply Comments at 4.

Commission Finding

The Commission has considered all the proposals, arguments, and administrative notice requests of the parties. The Commission notes that the primary purpose of the poles is to provide utility services. There are at least four different methodologies currently used by the Pole Owners and Attaching Entities to calculate Pole Attachment rates in Arkansas – RUS electric cooperative formula, FCC Cable formula, FCC CLEC

(telecom) formula, and ILEC joint use agreements. Each of these formulas produces a different rate. Therefore, adoption of a single maximum Pole Attachment rate formula will likely produce a rate different than the rate currently paid by an Attaching Entity. In addition, the Commission emphasizes its preference for voluntarily negotiated agreements.

The parties' propose varying methods to derive the maximum rate for Pole Attachments. The Attaching Entities recommend the FCC's Cable Formula which would allocate 7.4% of the pole costs to each Attaching Entity. By contrast AECC discusses four rate formulas (APPA, Delaware, Indiana, and Maine) and recommends a methodology that would allocate 31.9% and 29.2% of the pole costs to a telecommunication and cable Attaching Entity, respectively. When there are two Attaching Entities, Staff's proposed formula would allocate 18.9% of pole costs to each Attaching Entity. Staff's rates are formulated in recognition that the primary purpose of the pole is to provide utility service and to ensure that each Attaching Entity pays a reasonable portion of the revenue requirement associated with poles. Staff states that it relied on the cost causation and benefits-received principles embodied in other rates established by the Commission in establishing a Pole Attachment rate formula. Staff's recommended formula uses historical costs in determining the pole costs, which is consistent with the ratemaking policies and principles associated with the Commission's establishment of just and reasonable utility rates.

The PARs do not prescribe a formula to be used in Pole Attachment agreement negotiations. Only if the parties are unable to agree on a just and reasonable rate and a complaint is filed with the Commission, would the PAR rate formula in Appendix A be

used and a decision made on whether or not the maximum rate should be applied. The Commission finds Staff's proposal balances the interests of Pole Owners and Attaching Entities and produces a maximum rate which is just and reasonable and in the public interest.

The Commission declines to adopt AECC's proposal to exempt the cooperatives from the PARs. The cooperatives are specifically subject to Act 740¹⁷ which requires the Commission to regulate the rates, terms, and conditions for Pole Attachments and develop necessary rules.

Rule 4.01 Pole Attachment Rate Formula

- (a) **When the parties fail to reach a voluntarily negotiated written agreement regarding the Pole Attachment rate and the complaint procedures under Section 5 of these Rules are invoked, the Commission will apply the formula in Appendix A of the Rules for determining the maximum just and reasonable rate.**

(No contested issues)

- (b) **The investments and expenses used in the Pole Attachment rate formula shall be based on historical or original cost.**

(No contested issues)

- (c) **The Pole Owner's net pole investment shall be adjusted to eliminate the investment in crossarms and other costs not associated with owning a pole. There is a rebuttable presumption that these costs are equal to 15% of net investment for electric utilities and 5% for telephone companies.**

AECC Reply Comments

AECC argues that "other costs not associated with owning a pole" could be interpreted to include the removal of guys and anchors that are necessary to keep the

¹⁷ Ark. Code Ann. § 23-4-1001(2)(A).

pole aloft. AECC proposes a change to “other appurtenances not necessary for communications company attachments” for clarification purposes. AECC Reply Comments at 31.

Joint Commenters Second Reply Comments

Joint Commenters do not agree with AECC’s modification to “other costs not associated with owning a pole.” The issue would not occur in most instances where the 15% reduction factor is applied to an aggregate Account 364 amount. In addition, to the extent a Pole Owner’s investment in guys and anchors is separately identified in the rate calculation, it should be noted that an attacher’s guys and anchors also provide pole stabilization. If an attacher is able to prove its guys and anchors provide stabilization to the pole, the Attaching Entity should be allowed a credit or offset when determining net pole investment. Instead of AECC’s suggestion, Joint Commenters recommend the FCC’s language that “crossarms and other non-pole investment” recorded in pole accounts is removed from pole investment values in the formula. Joint Commenters Second Reply Comments at 50-51.

Commission Finding

The Commission finds that the versions of “other costs” proposed by AECC and Joint Commenters do not provide any greater clarity than Staff’s proposal for Rule 4.01(c), which the Commission thus finds to be reasonable and in the public interest.

(d) When the net pole investment is zero or negative, the gross investment may be substituted for the net investment in Appendix A, except for the Return Element of the carrying charges which is always a net calculation - The Return Element shall be calculated as follows:

Return Element = 8.00% x Net Pole Investment ÷ Gross Pole

Investment

Joint Commenters Reply Comments

Joint Commenters agree with Staff's proposed rule, which attempts to accommodate calculation modifications in zero or negative pole investment situations. However, the depreciation element must also be modified in order for the carrying charge element to be applicable to the gross cost of a bare pole. In zero or negative situations, the depreciation rate itself must be applied to the gross cost of a bare pole.

Joint Commenters proposed to add:

Depreciation Element = Depreciation Rate for Gross Pole Investment

Joint Commenters Reply Comments at 49-51.

Commission Finding

The Commission notes that when pole investment is zero or negative, Staff's proposed formula substitutes "Gross Pole Investment" for "Net Pole Investment," which results in the same outcome as Joint Commenters' suggested modification.¹⁸ Therefore, the Commission finds Joint Commenters suggested change unnecessary and Staff's proposed Rule 4.01(d) to be reasonable and in the public interest.

(e) The following rebuttable presumptions are used in the calculation of the space factor:

Staff Initial Comments

Staff states that the rebuttable presumptions facilitate the calculation of the rate

¹⁸ When the pole investment is zero or negative, the formula would be: $\text{Depreciation Rate} \times \text{Gross Pole Investment} \div \text{Gross Pole Investment}$, or $\text{Depreciation Rate} \times 1$. For example if the gross pole investment is \$500 and the net investment is \$0 and the depreciation rate is 8%, the calculation under Staff's formula would be:

$$8\% \times (\$500 / \$500) = 8\%$$

Therefore, the Depreciation Element would be 8%, the same as suggested by the Joint Commenters.

formula and can be rebutted by either the Pole Owner or Attaching Entity. Staff Initial Comments at 14.

- (1) The height of a pole is equal to 37.5 feet.
- (2) Usable Space on the pole is equal to 10.17 feet.

Staff Initial Comments

The usable space is allocated based on the amount of space occupied by each party's attachment. Staff Initial Comments at 14.

AECC Reply Comments

AECC proposes to add "except that for electric cooperative poles it is 7.67 feet." AECC Reply Exhibit at 15.

Joint Commenters Second Reply Comments

Joint Commenters previously addressed AECC's suggested changes. Joint Commenters Second Reply Comments at 51.

Commission Finding

The Commission finds Staff's proposal for Rule 4.01(e)(2) to be reasonable and in the public interest. The rule defines a rebuttable presumption which may be overcome by the specific facts of a case.

- (3) Unusable Space on the pole is equal to 27.33 feet, which includes the Safety Space.

Staff Initial Comments

One-third of the unusable space is allocated to the Pole Owner in recognition that the primary purpose of the pole is to provide utility service. The remaining two-thirds are allocated equally to the Pole Owner and Attaching Entities. Staff Initial Comments

at 14.

AECC Reply Comments

AECC argues that all entities attaching to a pole receive equal benefits from the unusable space. Staff's proposed formula only allocates two-thirds of the unusable space equally with the remaining one-third allocated to the Pole Owner. The unusable space should be divided equally to Attaching Entities and the Pole Owner. AECC Reply Comments at 11-12.

AECC states the amount of Common Space (Unusable Space) in rural areas is considerably less than in urban or suburban areas because poles have longer span lengths. This requires attachments to be placed 20-23 feet above ground to achieve the necessary 15.5-foot mid-span clearances. AECC proposes to add "except that for electric cooperative poles it is 29.83 feet." AECC Reply Comments at 31.

AECC Second Reply Comments

In Second Reply Exhibit AECC-4, AECC calculates the average annual cost of pole ownership for an Attaching Entity. To own and maintain a pole the average is \$281.38 and to acquire an existing pole is \$70.43. Assuming a \$20.00 annual rental, "which would be high in most instances," the Attaching Entity would save \$261.38 and \$50.43, respectively. These are savings to the Attaching Entities by avoiding pole ownership and maintenance of their own distribution system. AECC Second Reply Comments at 14.

AECC argues that every Attaching Entity, including the Pole Owner, receives equal benefits from the unusable space, especially considering the alternative of building its own system. Every entity has an equal need and receives equal benefit from "having the pole installed six feet into the ground and having its attachment raised at least 18 feet

above ground level in order to meet the minimum NESC mid-span clearance requirement of 15.5 feet.” To more closely match costs with benefits, AECC argues that the unusable space should be allocated equally among the Attaching Entities and the Pole Owner. AECC notes that both AT&T and Verizon proposed that the unusable space be allocated equally to the FCC in 2008. AECC Second Reply Comments at 14-15.

Commission Finding

The Commission agrees with Staff that the primary purpose of the pole is to provide utility service. In recognition of this, the Commission finds Staff's proposal for allocating unusable space to be reasonable and in the public interest. The Commission also notes that the amount of unusable space to be allocated is a rebuttable presumption which may be overcome by the specific facts of a case.

(4) Occupied Usable Space is:

(A) Cable television service is equal to 1 foot.

(B) Telecommunications service is equal to 1 foot.

AECC Reply Comments

AECC states that, on average, telecommunications attachers use two feet of space. AECC argues that under Staff's proposed rate formula, telecommunications attachers receive the benefit of using twice as much space at a price of one-half the amount. AECC Reply Comments at 11 and 31. AECC also suggests that rebuttable presumptions for the space occupied by electric service (4 feet) and wireless service (7 feet) should be included. AECC Reply Comments at 32.

Joint Commenters Second Reply Comments

Joint Commenters recommend the Commission reject AECC's modifications and

replace it with a one-foot assumption for all attachers in calculating the Occupied Space ratio in the cable formula. Joint Commenters Second Reply Comments at 51.

Commission Finding

The Commission finds Staff's proposal for Rule 4.01(e)(4) to be reasonable and in the public interest. The Rule defines a rebuttable presumption which may be overcome by the specific facts of a case.

(5) The presumptive average number of attachers on a pole is equal to three, which includes the Pole Owner.

AECC Reply Comments

AECC states that the presumptive number of attachers in densely populated areas may be three, but in rural Arkansas it is more likely to be two. AECC proposes to add that the presumptive number of attachers for electric cooperatives is two. AECC Reply Comments at 32.

Joint Commenters Second Reply Comments

Joint Commenters recommend the Commission reject AECC's proposal to change the presumptive number of attachers to two. It only serves to increase the rate and is unnecessary because this is a rebuttable presumption. The minimum number is two (Pole Owner and attacher) and the three attacher presumption recognizes that there will be poles that have attachers in addition to the minimum. It is appropriate that the Pole Owner who controls the records have the burden to show the average is less than three. Joint Commenters Second Reply Comments at 51-52.

Commission Finding

The Commission finds Staff's proposal for Rule 4.01(e)(5) to be reasonable and in

the public interest. The rule defines a rebuttable presumption which may be overcome by the specific facts of a case.

(6) A Pole Owner may only challenge the presumptive average number of attachers in Rule 4.01(e)(5), upon a showing that:

(A) Each Pole Owner upon request, provided all Attaching Entities and all entities seeking access, the methodology and information upon which the Pole Owner's average number of attachers is based,

(B) Each Pole Owner exercised good faith in establishing and updating its average number of attachers, and

(C) The methodology used to demonstrate why the presumptive number is incorrect.

(No contested issues)

(7) An Attaching Entity may only challenge the presumptive average number of attachers in Rule 4.01(e)(5) or the average number of attachers propounded by the Pole Owner pursuant to Rule 4.01(6), upon a showing of:

(A) Information demonstrating why the Pole Owner's average is incorrect, and

(B) What the Attaching Entity believes should be the average and the methodology used to obtain that average. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(No contested issues)

(8) Upon successful challenge of the existing average number of attachers pursuant to Rule 4.01(e)(6) or (7), the resulting data determined shall be used by the utility as the number of attachers within the rate formula.

(No contested issues)

(f) The presumptions in 4.01(e)(1)-(4) may be rebutted by either the Pole Owner or the Attaching Entity.

(No contested issues)

Rule 4.02 Duct/Conduit Rate Formula

- (a) When the parties fail to reach a voluntarily negotiated written agreement regarding the Duct/Conduit rate and the Commission's complaint procedures under Section 5 are invoked, the Commission will apply the formula in Appendix A of the Rules for determining the maximum just and reasonable rate.**

(No contested issues)

- (b) The investments and expenses used in the Duct/Conduit rate formula shall be based on historical or original cost.**

(No contested issues)

- (c) In the calculation of the percentage of Conduit capacity occupied, if no Inner-Duct is installed in the Conduit, the number of Inner-Ducts is presumed to be 2.**

(No contested issues)

Rule 4.03 Modification Costs

Pole Owners shall charge Attaching Entities separately for the following:

- (a) Make-Ready Work pursuant to Rule 2.03.**

(No contested issues)

- (b) Solely Assigned; Excess Height. When an Attaching Entity, including the Pole Owner, except as provided for under Rule 2.02(d), requires additional space which is not available on that pole, and the pole must be replaced by a taller pole, the entity causing the need for replacement shall pay for the replacement cost of such pole, including the cost of removing the old pole, less any salvage value plus the costs of transferring the facilities of all other attachers.**

Staff Initial Comments

Make-Ready costs are non-recurring and are not included in the Pole Attachment

rate. In addition, if a taller pole is required to accommodate an attachment, the entity causing the need for replacement will pay for the “replacement cost of the pole, including the cost of removing the old pole, less any salvage value, plus the costs of transferring the facilities of all other attachers. Staff Initial Comments at 16.

AECC Reply Comments

AECC proposes a change that would clarify that all Attaching Entities and the Pole Owner would bear their respective costs for transferring facilities if a pole is replaced due to electric system upgrades. AECC Reply Comments at 32.

Joint Commenters Second Reply Comments

Joint Commenters state Staff’s proposed rule properly allocates the cost of replacing a pole, including the transfer of other attachers’ facilities, to the cost causer. AECC’s proposed modification would completely eliminate the Pole Owner from ever paying the transfer of facilities costs when the Pole Owner is the cost causer. “Electric system upgrades” is such a broad term that it would apply in almost every situation where a Pole Owner requires a taller or stronger pole. Joint Commenters suspect that any time a Pole Owner replaced a pole it would be for “electric system upgrades” and attachers would be responsible for the transfer costs. Joint Commenters recommend that the Commission reject AECC’s modification, as “it will lead to more disputes at the Commission, undercuts the principle of “cost causer pays” in the rule, and does not represent “effective regulation.” Joint Commenters Second Reply Comments at 52-53.

PCIA Second Reply Comments

AECC proposes to have Attaching Entities bear their own costs when a pole is replaced due to electrical system upgrades, but when an Attaching Entity seeks

rearrangement or replacement of facilities that entity must bear its own costs. PCIA recommends the Commission adopts rules requiring a Pole Owner to bear the cost of transferring all facilities when the upgrade is to accommodate new electric facilities. PCIA Second Reply Comments at 6-7.

Commission Finding

The Commission agrees with the Joint Commenters and PCIA that Staff's proposed Rule properly allocates the cost of replacing a pole, including the transfer of other attachers' facilities, to the cost causer. Therefore, the Commission finds Staff's proposal for Rule 4.03 (b) to be reasonable and in the public interest.

- (1) Mutual Assignment. When a taller pole is required by two or more Attaching Entities, including the Pole Owner, except as provided under Rule 2.02(d), the costs identified in Rule 4.03(b) shall be shared equally among the entities requiring the replacement.**

(No contested issues)¹⁹

(c) Rearrangements.

Except as provided for under Rule 2.02(e), an entity that obtains a Pole Attachment shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity.

AECC Reply Comments

AECC proposes a change that would clarify that the entity seeking the modification would pay the cost of the rearrangement or replacement of facilities. AECC Reply Comments at 32.

¹⁹ For purposes of clarity, the Commission renumbers proposed Rule 4.03(b)(1) to 4.03(b)(2).

Commission Finding

The Commission notes that Staff's proposed Rules require the entity seeking the modification to pay the cost of the rearrangement or replacement of facilities. Therefore, the Commission finds Staff's proposal for Rule 4.03(c) to be reasonable and in the public interest.

SECTION 25. COMPLAINT PROCEDURES

Staff Initial Comments

Staff states its modifications to the Complaint Procedures section include grammatical changes for clarity and minor changes to make this section consistent with the Commission's *Rules of Practice and Procedure* (RPPs). Specifically, the time to respond to a complaint was changed from 45 days to 30 days. Staff Initial Comments at 17.

Rule 25.01 Time for Resolution

The Commission shall resolve any **formal** complaint ~~or dispute~~ filed in accordance with these Rules **and the Commission's Rules of Practice and Procedure** within 180 days after the complaint is filed, except that the Commission, for good cause shown, may extend the time for resolution up to 360 days.

Commission Finding

The Commission observes that this rule leaves off the conclusory phrase of subsection (c)(2) of Ark. Code Ann. § 23-4-1004 and therefore finds that the phrase "after the complaint is filed" should be added to the rule to conform to the statute.

Rule 25.02 Informal Resolution

~~(a)A. Before filing a formal complaint, E~~every complainant shall, ~~before filing a complaint,~~ make a good faith effort to informally

resolve the dispute with the respondent ~~the situation complained of.~~

~~(b)B.~~ The complainant and respondent shall, within 30 calendar days of a request by the other for data relevant to the situation, provide the data that is publicly available.

~~(c)C.~~ An entity shall not be required to submit data that is not publicly available until the other entity agrees, in writing, that it will use that information only for purposes of resolving the dispute ~~or complaint at issue~~ and will not disclose that information except as may be required by the Commission.

(No contested issues)

Rule 5.03 Filing Requirements

The **formal** complaint shall be filed in compliance with the Commission's Rules of Practice and Procedure and meet the following requirements:

~~(a)A.~~ The complaint shall be accompanied by supporting written testimony and exhibits of a person or persons with actual knowledge of the facts and any exhibits provided in support of complaint testimony shall be verified by the person providing the exhibit.

Commission Finding

The Commission finds that this subsection is duplicative of the Commission's RPPs and that the requirements that exhibits be "verified" and that both testimony and exhibits be filed are inconsistent with the RPPs. The Commission therefore deletes Rule 5.03(a) since the Rule already refers to the RPPs.

~~(b)B.~~ Workpapers and documentation shall be provided to all parties at the time of the filing of the complaint that are sufficient to support all information required by this Section.

Commission Finding

The Commission finds that this subsection is duplicative of the Commission's

RPPs. When this section was initially proposed in Docket No. 08-073-R, the RPPs had not been revised to incorporate the provisions on workpapers.²⁰ The Commission therefore deletes Rule 5.03(b) since the Rule already refers to the RPPs. Accordingly, the Commission renumbers the ensuing subsections of Rule 5.03.

~~(c)C.~~ The complaint shall be accompanied by a copy of the Pole Attachment agreement, if any, between the Attaching Entity and the ~~Public-Utility p~~Pole ~~o~~Owner.

(No contested issues; subsection renumbered as (a))

~~(d)D.~~ The ~~Public-Utility p~~Pole ~~o~~Owner or Attaching Entity shall state with specificity in its complaint the section(s) of these Rules or Ark. Code Ann. § 23-4-1001 *et seq.* that is(are) claimed to be violated, or, if a written- Pole Attachment agreement already exists, the rate,~~(s)~~, term,~~(s)~~, ___ or condition~~(s)~~ of that agreement that is~~(are)~~ claimed to have been violated.

CTIA Second Reply Comments

CTIA opposes Staff's proposed Rule 5.03(d) on the basis that it would unjustly allow the Pole Owner to request the Commission enforce an unreasonable rate, term or condition in an existing agreement that conflicts with the final rules. CTIA asserts that this conflicts with Act 740's intent and invites abuse. CTIA Second Reply Comments at 9.

CTIA states any concern that CTIA's suggested approach infringes on the jurisdiction of Arkansas courts is misplaced. CTIA asserts that the Legislature has not vested the Commission with the authority to determine whether there has been a breach of contract or whether there has been some other kind of event that is the province of tort law or some other civil theory of recovery. For example, according to CTIA, litigation from an accident involving a pole that results in property damage or personal

²⁰ Adopted by Order Nos. 17 & 18, Docket No. 08-135-R, effective 1/1/14.

injury would be resolved in a court rather than at the Commission. CTIA argues that “the legislature merely has vested in the Commission the authority *and obligation* to regulate an essential component of the state’s monopoly controlled infrastructure, its utility poles, to ensure that the rates, terms and access to those poles are just and reasonable.” CTIA Second Reply Comments at 9-10 (Emphasis in original).

CTIA recommends adding “or the rate(s), term(s) or condition(s) that is (are) claimed to be unjust and unreasonable,” on the basis that this revision is consistent with the Commission’s statutory authority over Pole Attachments and Rule 5.03(h). CTIA Second Reply Comments at 10.

Commission Finding

CTIA’s comments suggest that the Commission should decide in this Docket whether the Commission may hear certain complaints on an existing contract. The Commission finds that this rulemaking docket is not the appropriate forum to address whether a specific complaint is jurisdictional to the Commission under Act 740 and therefore declines to adopt CTIA’s proposal. The Commission does find that renumbered Rule 5.03 (b) could be streamlined and thus finds the following language to be reasonable and in the public interest:

(b) The complaint shall state with specificity the section(s) of these Rules, Ark. Code Ann. §§ 23-4-1001 *et seq.*, or the agreement that is (are) claimed to have been violated.

~~(e)~~**E.** **The complaint shall include the data and information necessary to support the claim, including where applicable, the data and information necessary to calculate the rate pursuant to Appendix A.**

(No contested issues; subsection renumbered as (c))

~~(f)F.~~ No complaint filed by an Attaching Entity shall be dismissed for failure to provide the information and data required in Rule **~~25.03.E(e)~~**, if the **~~Public Utility pole~~ Pole Owner** has failed to provide such information and data after **~~such a~~** reasonable request.

(No contested issues; subsection renumbered as (d))

~~(g)G.~~ In a case where an **~~Attaching Entity claimant~~ claims-alleges** that it has been denied access to a pole, Duct, or Conduit despite a written request for such access, the complaint shall include the data and information necessary to support the **~~claim~~ allegations**, including:

- (1) The reasons given for the denial of access to the **~~Public Utility pole owner Pole Owner's~~ poles, Ducts or Conduits;**
- (2) The basis for the complainant's **~~claim-allegation~~** that the denial of access is improper;
- (3) The remedy sought by the complainant;
- (4) A copy of the written request to the **~~Public Utility pole owner Pole Owner~~ Pole Owner** for access to its poles, Ducts, or Conduits; and

(No contested issues; subsection renumbered as (e))

- (5) A copy of the **~~Public Utility pole owner Pole Owner's~~ Pole Owner's** response to the written request including all information given by the **~~Public Utility pole owner Pole Owner~~ Pole Owner** to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a **~~Public Utility pole owner's Pole Owner's~~ Pole Owner's** written response, or if the **~~Public Utility pole owner Pole Owner~~ Pole Owner** denies the complainant any other information reasonably needed to establish **~~a-its~~ prima facie** case.

AECC Reply Comments

Due to concerns that the information the cooperative provides to Attaching Entities in the complaint process may not be kept confidential, AECC is proposing a change that allows a complaint to be dismissed if the Attaching Entity cannot provide

the information with its complaint, as required by the PARS, because it would not sign a confidentiality agreement. AECC Reply Comments at 48.

Commission Finding

The Commission finds that where an Attaching Entity cannot provide the required information in its complaint because it has not signed a confidentiality agreement, it might be appropriate to dismiss the complaint. However, each case should be examined on its facts. Therefore, the Commission finds that AECC's proposed change to Staff's proposed Rule 5.03(g)(5) should not be adopted. Accordingly, the Commission finds Staff's proposal for (as renumbered) Rule 5.03(e)(5) to be reasonable and in the public interest.

~~(h)H.~~—The source of data and information required under this Section shall be identified. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(No contested issues; renumbered as (f))

~~(i)I.~~—The complaint shall include a brief summary of all steps taken to informally resolve the problem prior to filing.

(No contested issues; renumbered as (g))

~~(j)J.~~—If any of the information ~~required to be~~ filed or provided under this Rule is data that is publicly unavailable from the respondent and which was provided ~~under pursuant to~~ Rule ~~25.02.C.~~(c):

- (1) The complainant shall not file or otherwise include provide the such data with the complaint, but the complaint shall generally-generically describe the data.**
- (2) The complainant shall include a notice to the respondent that the complainant intends to use the data in the complaint proceeding.**

- (3) If the respondent desires to protect the data from public disclosure, the respondent shall have ~~twenty (20)~~ days from the date of service of the complaint to file a motion for protective order pursuant to the Commission's Rules of Practice and Procedure.
- (4) If the respondent has not filed a motion for protective order within ~~twenty (20)~~ days from the date of service of the complaint, the complainant shall file the data as a supplement to its complaint.

(No contested issues; renumbered as (h))

Rule ~~25~~.04 Response and Reply

~~(a)A:~~ Respondent shall have ~~45—30~~ days from the date the complaint ~~is was~~ filed ~~within which~~ to file a response.

~~(b)B:~~ The response shall address each of the complainant's allegations. ~~Factual allegations~~ Responses shall be supported by written testimony of a person or persons with actual knowledge of the facts and any exhibits provided in support of response testimony shall be verified by the person ~~who prepares them—providing the exhibit.~~

~~(c)C:~~ Complainant shall have 20 days from the date the response filed ~~within which~~ to file a reply.

~~(d)D:~~ The complainant's reply shall address each of the respondent's ~~response— responses.~~ ~~Factual allegations—~~ The reply shall be supported by written testimony of a person or persons with actual knowledge of the facts and any exhibits provided in support of reply testimony shall be verified by the person ~~who prepares them. providing the exhibit.~~

Commission Findings

Consistent with the Commission's findings on Rule 5.03(a), the Commission finds that subsections (b) and (d) are duplicative of or conflict with the Commission's RPPs. In addition, Staff noted that the time a Respondent has to respond to a complaint was changed from 45 to 30 days to make the complaint procedure consistent with the

RPPs. Staff Initial Comments at 17. However, Rule 9.02(d)(1) of the RPPs sets the time for a response to a complaint at 20 days and does not require the filing of testimony at that time. The Commission finds that its current complaint procedures²¹ are reasonable for consideration of pole attachment complaints and therefore revises Rule 5.04 as follows:

- (a) The complaint shall be served on respondent pursuant to Rule 9.02 of the Commission's *Rules of Practice and Procedure*.
- (b) Respondent may file a response pursuant to Rule 9.02 of the Commission's *Rules of Practice and Procedure*.
- (c) Thereafter, the Commission may adopt a procedural schedule for the filing of written testimony with or without a hearing, as appropriate.

SECTION 6. PENALTIES FOR SAFETY AND OTHER VIOLATIONS.

AECC Reply Comments

In order to ensure safety and reliability and help remedy prior abuses, AECC is proposing to add a new section.

SECTION 6. PENALTIES FOR SAFETY AND OTHER VIOLATIONS.

- (a) It is reasonable for a Pole Attachment contract to include provisions which allow the Public Utility Pole Owner to impose penalties on the Attaching Entity for unauthorized attachments and for violation of the provision of such a contract regarding safety.
- (b) The following are examples of penalties that are reasonable to include in a pole attachment contract:
 - (1) If an Attaching Entity, upon receipt of a Public Utility pole owner's written notification of a violation of Rules 3.01, does not remedy the violation within the time period specified in the notice, the public utility pole owner may

²¹ Which became effective 1/1/14, after the adoption of the original PARs on 7/30/08.

assess a penalty of \$200 per violation and/or correct the violation itself and require the Attaching Entity to reimburse the public utility pole owner for the owner's actual costs. In addition, the public utility pole owner may impose an additional charge under this section not to exceed 15 percent of the actual cost of corrections incurred.

- (2) An amount not to exceed \$100 plus five times the current annual rental fee plus interest per pole or per meter of conduit for any unauthorized attachment (including attachments that fail to comply with applicable service drop and Overlapping provisions), plus any other remedies available for trespass.

AECC Reply Comments at 48-49.

AECC states that its proposed sanctions are consistent with Ark. Code Ann. §23-4-1003, which authorizes the Commission to develop rules regulating the rates, terms, and conditions of Pole Attachments and requires the Commission to consider, among other things, reliability, and compliance with safety standards. AECC Reply Comments at 49.

AECC states that Oregon's similar sanction provisions have eliminated large numbers of unauthorized attachments. AECC references a 2008 Portland General Electric PowerPoint that shows a drop in unauthorized attachments from 30% in 1996 to 1% in 2007. AECC Reply Comments at 49. AECC contrasts this with no enforcement provision in Arkansas, where one member found that 82% of 5,500 poles audited were out of compliance and more than 40% of the 82% would require a change-out or new mid-span pole to correct the problem. AECC Reply Comments at 49-50 and Reply Exhibit AECC-8.

AECC states that, under Arkansas law, a contractual provision would be unenforceable if the penalty did not bear a relationship to the damages likely resulting

from the breach. AECC represents that its proposed sanctions are modest and relate directly to the damages that would likely occur. AECC notes that a liquidated damages provision allows recovery from the breach of an agreement if: “(1) the parties contemplated that damages would flow from a failure to perform the contract; (2) damages would be indeterminate or difficult to ascertain; and (3) the damage amount is reasonably proportionate to the damages expected to flow from a breach.” AECC states damages would and do occur and can be difficult to specifically calculate. To the extent predictable, the damage amounts proposed are reasonably proportionate to the expected damages. AECC Reply Comments at 50.

AECC requests the Commission include the proposed sanction provisions as “consistent with the public interest and enforceable under Arkansas law as liquidated damages.” Unless the appropriateness of liquidated damages is addressed, AECC asserts that “pole owners will be unable to prevent these types of widespread abuses and the public interest will suffer as a result.” AECC Reply Comments at 50-51.

AECC urges adoption of its proposed rules on the basis that pole attachers’ rights should be accompanied by the obligation to pay their fair share of the cost of those facilities and to attach in a responsible manner. AECC Reply Comments at 51.

Joint Commenters Second Reply Comments

While Joint Commenters support safe attaching practices, they assert that violation penalties give incentives to generate revenue based on false violations, particularly when “safety” consultants are compensated on a percentage-based bounty. Joint Commenters argue that violation penalties would divert resources from upgrading communications facilities; provide no dividends to Arkansas residents; and merely

increase Pole Owner and outside consultant revenue. Joint Commenters note that, in addition to safety code compliance, Pole Attachment agreements already include one-way indemnity and insurance provisions, bond requirements, and default clauses. Joint Commenters warn that these provisions will lead to an ineffective joint-use environment with numerous disputes at the Commission. Joint Commenters Second Reply Comments at 54.

Joint Commenters respond, regarding AECC's example of the Oregon model, that "electric utilities in Oregon so-abused their sanctioning power as a revenue-generating mechanism that the Oregon Public Utility Commission ("OPUC") was forced to drastically curtail the electric utilities' ability to penalize attachers after joint use came to a standstill due to the volume of disputes before the OPUC." Joint Commenters Second Reply Comments at 54.

Joint Commenters do not believe the Commission has authority "to codify a private levy of a fine or penalty in its rules." Joint Commenters assert that fines may only be levied by neutral arbiters, such as government bodies, who are subject to basic fairness and due process requirements in evaluating the facts and proposed solutions. Arkansas courts will not enforce a fine or penalty imposed in a private contract, according to Joint Commenters. Joint Commenters Second Reply Comments at 55.

Joint Commenters argue that penalties are not, as suggested by AECC, equivalent to liquidated damages. Rather, "[t]he general rule governing liquidated damages is that an agreement in advance of breach will be enforced if the sum named is a reasonable forecast of just compensation for the injury, if the harm is difficult or incapable of accurate estimation." Joint Commenters note that no monetary damage occurs unless

the Pole Owner fixes the violation and provide the following examples: If an attachment is one inch out of compliance, the Attaching Entity would be charged the actual cost of repair incurred by the Pole Owner. If serious property damage or bodily injury occurs, “the indemnification and insurance clauses contained in all Pole Attachment agreements would apply.” If there is an unpermitted attachment, the attacher would be required to pay back rent and in some case, unauthorized attachment fees. Joint Commenters Second Reply Comments at 55-56.

Joint Commenters state there is “no legal, economic, or policy basis” to allow Pole Owners to charge “outrageous, purely revenue-generating penalties.” Joint Commenters Second Reply Comments at 56.

CTIA Second Reply Comments

CTIA state AECC’s proposal would give the cooperatives the “type of punitive sanction authority vested in the utilities under the Oregon rules.” CTIA asserts that AECC’s argument regarding the number of unauthorized attachments plummeting in Oregon is flawed. According to CTIA, Exhibit AECC-8 shows that there were fewer unauthorized attachments as compared to the prior year in only two of the seven years in which the audit was conducted and that in all other years the rate increased. CTIA supports an appropriate system to ensure that poles are free of safety violations and unauthorized attachments, but urges that enforcement should not discourage investment in appropriate pole usage. CTIA emphasizes that the public-policy imperative of facilitating broadband should not be discounted because connectivity is increasingly important to modern life. . CTIA Second Reply Comments at 16-17.

PCIA Second Reply Comments

PCIA opposes the proposed penalty provisions on the basis that they “would allow monopoly pole owners to play private policeman.” PCIA asserts that Pole Owners have incentive to abuse this process and examples of abuse within the safety violation audit process have been provided. PCIA urges the Commission to ensure rates and pole access rules are fair and states that allowing this proposal would be a step in the wrong direction. PCIA Second Reply Comments at 9-10.

Commission Finding

The Commission rejects AECC’s proposal to add a new section providing for penalties by the Pole Owner for safety and other violations. The evidence does not support a rule which allows the Pole Owner, instead of a neutral arbiter, to levy a penalty for alleged violations. Nor does the evidence show that current remedies such as seeking damages, instead of imposing penalties, for breach of contract are ineffective to enforce safety or other violations. However, parties have the ability to voluntarily negotiate agreements containing penalties or seek to justify such a provision from the Commission on a case-by-case basis if they cannot reach a voluntary agreement.

4. Commission Findings on General Comments

The following findings pertain to issues raised by some parties, which issues are not tied to specifically language in the PARs themselves:

1. The role of the Commission in resolving complaints.

Like the language in Act 740, Ark. Code Ann. § 23-4-1003(c), the PARs encourage voluntarily negotiated agreements. But in the absence of such agreements or failure of the parties to negotiate them, the Rules establish a starting point for Commission

consideration of complaints regarding the rates, terms, and conditions upon which the Pole Owners and Attaching Entities are unable to reach agreement. This is consistent with the approach taken by the Commission under the existing PARs since 2008, during which time a total of six complaints have been filed by complainants. In four of those dockets, the complainant requested and was granted dismissal with prejudice. In one docket, the complainant requested and was granted a dismissal without prejudice, which was refiled in a new docket. In that docket the complainant requested dismissal with prejudice (included in the previous four). In one docket there was a summary judgment by a Commission administrative law judge, and the complaint was dismissed. The Commission finds that these facts are strongly indicative of the ability of the Pole Owners and Attaching Entities to resolve differences among themselves over Pole Owners' failure or refusal to provide access, the inability of the parties to reach a voluntarily negotiated, written agreement, or to resolve differences between the parties over the implementation of existing contracts, all without the intervention of the Commission.

2. Force Majeure.

With respect to EAI's request to include a *force majeure* provision in the rules (EAI Reply Comments at 6), the Commission agrees with PCIA's comment that such provisions are typically included in negotiated agreements. PCIA Second Reply Comments at 11. Accordingly, the Commission finds that it is unnecessary to add a *force majeure* clause to the revised PARs.

3. CECC arguments on takings.

CECC argues that the any rule established by the Commission for the use of

easements and poles of CECC that results in a subsidization to Attaching Entities is a “taking without just compensation” in violation of the Arkansas and the 5th Amendment to the United States Constitution. CECC Reply Comments at 1-4. In response, Joint Commenters assert that CECC’s taking arguments are without merit, citing *FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987), where the Supreme Court found that a rate reflecting no less than fully allocated costs, including the actual cost of capital, is not confiscatory. Joint Commenters contend that both Staff’s proposed formula and the cable formula (which it advocates) are consistent with the Arkansas and United States Constitution. Joint Commenters Second Reply Comments at 59-60.

In justifying the rate formula for Pole Attachments proposed in Appendix A, Staff relied upon the cost causation and benefits-received principles embodied in other rates established by the Commission. Staff Initial Comments at 12-13. The Commission finds that Staff’s recommended formula uses historical costs in determining the pole costs, which is consistent with the Commission’s ratemaking policies and principles associated with establishing just and reasonable utility rates. The 5th Amendment provides in part: “[N]or shall private property be taken for public use, without just compensation.” Applying this language to the public utility context, Justice Brandeis described what property is “taken,” for which compensation is due:

The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility to earn a fair return.

Missouri ex rel. Southwestern Bell Telephone Co. v Public Service Comm’n, 262 U.S. 276, 290 (1923).

The Commission finds that Staff’s proposed formula included in the PARs is

appropriately compensatory to Pole Owners, is just and reasonable, and is not a taking.

5. Additional Commission Findings and Ruling

In addition to the changes made as described herein, the Commission has made minor changes to formatting to make the PARs internally consistent and consistent with other Commission rules, all as shown on the marked-up copy in Attachment A.

In regard to the three requests for administrative notice filed after the hearing, the Commission notes that the evidentiary record was closed at the conclusion of the hearing. Although the Commission may take official notice under Rule 4.08(b) of the RPPs, pursuant to that rule all parties must be accorded “an opportunity to examine the document and interrogate witnesses on the document.” Because this rule contemplates action before the hearing and requestors did not request notice until after the hearing, the Commission declines to take administrative notice of the requested items as parties have no opportunity to interrogate witnesses at this stage of the Docket. If any party desires to request rehearing of this Order, it may at that time seek permission to use this evidence pursuant to Rule 4.14 of the RPPs.

The Commission finds that newspaper notice of this Rulemaking has been published pursuant to Rule 2.03 of the Commission’s RPPs. The Commission further finds that the Arkansas Legislative Council and the Joint Interim Committee on Insurance and Commerce of the Arkansas General Assembly have been notified of this rulemaking proceeding in the manner prescribed by law. The Commission also finds that the Governor of Arkansas has been notified of and approved the PARs as proposed, in accordance with Executive Order 15-02.

Having reviewed and considered Staff’s Initial Comments and Proposed

Amendments to the PARs; the Reply Comments of EAI, SWEPCO, OG&E, AECC and the Member Cooperatives, CECC, PCIA, CTIA, and the Joint Commenters; Staff's Reply Comments and additional proposed modifications to the PARs; the Second Reply Comments of AECC and the Member Cooperatives, SWEPCO, PCIA, CTIA, and the Joint Commenters; and the oral testimony provided by the parties during the public evidentiary hearing, the Commission finds that the PARs as set out in Attachment B to this Order are just and reasonable and will serve to ensure the orderly administration of matters and proceedings before the Commission, and thus are in the public interest. Therefore, the Commission adopts the PARs as set in Attachment B to this Order. Attachment B is the "clean" copy of the final PARs adopted herein. Attachment A is a blacklined copy of the PARs , which shows the changes adopted by this Order to Staff's proposed modifications to the PARs that were included as Attachment A to Staff's Reply Comments.

6. Commission Ruling and Order

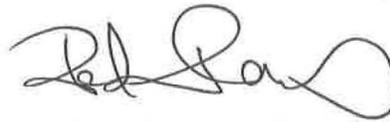
Accordingly, the Commission orders and directs as follows:

1. The PARs as set out in Attachment B to this Order are reasonable, appropriate, and in the public interest and are hereby adopted to be effective upon review and approval by the Governor and the Arkansas Legislative Council.
2. The Secretary of the Commission is directed to prepare and make all filings as required by law and Rule 2.04 of the Commission's RPPs with the Governor, the Arkansas Legislative Council, Arkansas Secretary of State, and the Arkansas State Library.

3. Staff is hereby directed to file in this Docket a letter or other documentation reflecting the dates of approval by the Governor and the Arkansas General Assembly, and the Secretary of the Commission shall note that the date of the latter of these two approvals is the effective date of the PARs.

BY ORDER OF THE COMMISSION.

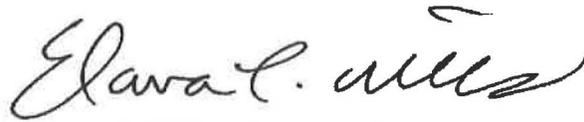
This 24th day of June, 2016.



Ted J. Thomas, Chairman

I hereby certify that this order, issued by the Arkansas Public Service Commission, has been served on all parties of record on this date by the following method:

U.S. mail with postage prepaid using the mailing address of each party as indicated in the official docket file, or
 Electronic mail using the email address of each party as indicated in the official docket file.



Elana C. Wills, Commissioner



Lamar B. Davis, Commissioner



Michael Sappington, Secretary of the Commission

Arkansas Public Service Commission



Pole Attachment Rules

Last Revised: June 24, 2016

Order No. 5

Docket No. 15-019-R

Effective: xx-xx-2016

POLE ATTACHMENT RULES

ADMINISTRATIVE HISTORY

<u>Docket</u>	<u>Date</u>	<u>Order No.</u>	<u>Subject Matter of Docket / Order</u>
08-073-R	07-30-08	5	Adopts rules relating to the rates, terms, and conditions upon which a Public Utility pole owner shall provide access for a Pole Attachment to comply with Ark. Code Ann. § 23-4-1001 through § 23-4-1006 (Act 740 of 2007).
15-019-R	XX-XX-16	5	Amends Definitions and moves to Section 1; amends Section 1; adopts new Sections 2, 3, & 4; renumbers Section 2 to Section 5 and amends.

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SECTION 1. PURPOSE, APPLICABILITY, AND GENERAL MATTERS

Rule 1.01 Definitions

The following definitions shall apply throughout the *Pole Attachment Rules* (PARs) except as otherwise required by the context and any references to the PARs shall include these definitions:

- (a) “Attaching Entity.” ~~An electric utility, a telecommunications provider, a cable television service provider, or a cable Internet access service provider.~~ A provider of electric service, telecommunication service, cable television service, internet access service or other related information services. The term "Attaching Entity" does not include a Pole Owner to the extent that it makes Pole Attachments to its own poles, Ducts, or Conduits.
- (b) “Conduit.” A structure containing one or more Ducts, usually placed in the ground, in which cables or wires may be installed.
- (c) “Duct.” A single enclosed raceway for conductors, cable or wire.
- (d) “Inner-Duct.” A Duct-like raceway smaller than a Duct that is inserted into a Duct so that the Duct may carry multiple wires or cables.
- (e) “Insufficient Capacity.” The inability of a Pole Owner to accommodate a new Pole Attachment or Overlashing through the performance of Make-Ready Work.
- (f) “Make-Ready Work.” Engineering or construction activities necessary to make a pole, Duct, Conduit, or other support equipment available for a new Pole Attachment, Pole Attachment modifications, or additional facilities.
- (g) “NEC.” The National Electrical Code published by the National Fire Protection Association.
- (h) “NESC.” The American National Standards Institute’s National Electrical Safety Code published by the Institute of Electrical and Electronics Engineers, Inc.
- (i) “Overlashing.” The placement of telecommunications provider, cable television service, or internet access service facilities on existing facilities that already are attached within the Usable Space allocated to an existing Attaching Entity. Overlashing is not considered a separate Pole Attachment.
- (j) “Pole Attachment.” As defined in Ark. Code Ann. § 23-4-1001(1).
- (k) “Pole Attachment Audit.” Any audit done at the option of the Pole Owner

to count the number of Pole Attachments by one or more Attaching Entities.

- (l) "Pole Owner." A public utility as defined in Ark. Code Ann. § 23-4-1001(2), having ownership or control of a pole, Duct, or Conduit.
- (m) "Safety Inspection." Any inspection done at the option of the Pole Owner to ensure Pole Attachments comply with applicable safety standards.
- (n) "Safety Space." As defined in the current issue of the NESC, the space located between the areas to which electric conductors and communication circuitry may be attached.
- (o) "Service Drop." A connection from distribution facilities to the building or structure being served that does not require guys under standard industry design practice.
- (p) "Unusable Space." The Unusable Space is equal to the length of the pole minus the Usable Space. Safety Space is included in Unusable Space.
- (q) "Usable Space." The space above minimum grade level available for circuit, communications, coaxial cable, fiber optic, or electrical conductor Pole Attachments, by Public Utilities and Attaching Entities.

Rule 1.02 Authority

These Rules are promulgated pursuant to, and in accordance with, the provisions of Act 740 of 2007 as codified in Ark. Code Ann. § 23-4-1001 through § 23-4-1006.

Rule 1.03 Applicability

These Rules apply to Pole Owners and Attaching Entities as defined in these Rules.

Rule 1.04 Purpose and Scope

These Rules govern the Commission's regulation of the rates, terms, and conditions upon which a Pole Owner shall provide nondiscriminatory access for a Pole Attachment in the absence of a voluntarily negotiated agreement. These Rules also govern the procedures necessary and appropriate to hear and resolve complaints arising from the failure or refusal to provide access, the inability of a Pole Owner and an entity seeking access for a Pole Attachment to reach a voluntary negotiated written agreement, and disputes over implementation of an existing contract.

Rule 1.05 Negotiated Agreements

Nothing in these Rules prevents or limits the ability of a Pole Owner and an Attaching Entity to enter into a voluntarily negotiated written agreement regarding the rates, terms, and conditions for Pole Attachment access. Voluntarily negotiated agreements are preferred and encouraged by the Commission. Nothing in these rules shall be

interpreted to supersede or modify any lawful rate, term, or condition of a voluntarily negotiated written agreement.

Rule 1.06 Communications

Pole Owners and Attaching Entities are encouraged to employ consistent and compatible communications systems for the purpose of notification and coordination associated with the Pole Attachments addressed in these rules.

SECTION 2. ACCESS AND NOTIFICATION

Rule 2.01 **Contracts and Permits**

- (a) Prior to installing a Pole Attachment, the Pole Owner and the Attaching Entity shall have a written contract that specifies the rates, terms, and conditions for the Pole Attachments.
- (b) An Attaching Entity shall have a permit from the Pole Owner, except as provided in Rule 2.01(c), for each Pole Attachment, including a permit covering any Overlashing, subject to the provisions of Rule 2.03 and Rule 2.04.
- (c) An Attaching Entity may install a Service Drop without first obtaining a separate permit for that Service Drop if the Service Drop can be installed by the Attaching Entity in compliance with Rule 3.01(a). The Attaching Entity shall account for and report the installation of Service Drops in compliance with the written contract for service as required by Rule 2.01(a).
- (d) Prior to the assignment, in whole or in part, of an existing Pole Attachment agreement, an Attaching Entity shall notify the Pole Owner of the assignment.
- (e) The Pole Owner shall notify all affected Attaching Entities of the sale or transfer of ownership of any pole.
- (f) The Pole Owner and the Attaching Entity shall exchange and maintain current contact information for both routine business and emergency notification, including but not limited to, name, telephone number, email address, and street address. Participation in a communication system consistent with Rule 1.06 is encouraged to facilitate this information exchange.
- (g) Pole Owners and Attaching Entities shall make a good faith effort to begin negotiations of the terms and conditions of a new agreement no less than ninety (90) days prior to the expiration of the current contract.

Rule 2.02 **Request for Access**

- (a) Requests to a Pole Owner for a Pole Attachment or Overlashing permit shall be in writing. The Pole Owner may require the applicant to provide the following technical information:
 - (1) the location of the pole, Duct, or Conduit for which the attachment or occupancy is requested;

- (2) the amount of space requested;
- (3) the number and type of attachment for each pole, Duct, or Conduit addition;
- (4) the physical characteristics of the attachment or addition;
- (5) the attachment location on the pole or in the Duct or Conduit;
- (6) the proposed route;
- (7) the proposed schedule for construction; and
- (8) any other information reasonably required by the Pole Owner and which is necessary to process the request.

A request containing the information set forth in items (1) – (8) above shall be considered to be a complete request for purposes of Rule 2.02(f).

- (b) An Attaching Entity wishing to overlash facilities shall submit a written request to the Pole Owner identifying the size and type of facilities to be overlashed, the size and type of facilities to be added, the poles over which such facilities will be overlashed, and when such facilities will be overlashed. In cases where a party is seeking to overlash facilities to another attaching entity, the party seeking to overlash shall also provide the Pole Owner evidence of the written consent of such host party.
- (c) The Pole Owner shall identify and account for the incremental engineering costs associated with a request for a Pole Attachment or Overlashing permit and the cost of estimating Make-Ready Work. A Pole Owner may charge an Attaching Entity incremental administrative costs associated with a request for a Pole Attachment or Overlashing permit and the cost of estimating Make-Ready Work, provided that the Pole Owner identifies and accounts for such incremental administrative costs. The Attaching Entity shall pay to the Pole Owner any incremental engineering costs or incremental administrative costs incurred and charged by the Pole Owner in connection with a request for a Pole Attachment or Overlashing permit, regardless of whether the Attaching Entity's request is rejected or withdrawn by the Attaching Entity.
- (d) A Pole Owner may reserve available space on its facilities for future provision of its core utility service, but must permit the use of such reserved space by Attaching Entities on an interim basis until the Pole Owner has an actual need for the space. The Pole Owner shall provide written notification to the Attaching Entity when a permit is being issued for the use of reserved space.

- (e) Within ~~4560~~ days of written notification that the space is needed by the Pole Owner, the interim Attaching Entity must vacate the occupied space at its own expense and pay for any modifications needed to maintain the attachment or pay for the expansion of capacity.
- (f) The Pole Owner shall approve, deny, or conditionally approve with Make-Ready Work provisions, the request for a Pole Attachment or Overlashing in writing as soon as practicable, but in no event later than:

~~(1) 14 days after the receipt of a complete request, if the permit request includes 10 or fewer poles;~~

~~(2) 45 days after receipt of a complete request, if the permit request includes between 11 and 30 poles; or~~

~~(1) 45 days after receipt of a complete permit request, for requests including no more than 300 poles or 20 manholes; or~~

~~(2) 60 days after receipt of a complete permit request, for requests greater than the preceding limits but less than 3,000 poles and 100 manholes.~~

~~(3) If the permit request includes more than thirty poles exceeds the preceding limits,~~ the parties shall work in good faith to negotiate a mutually agreeable timeframe.

~~For purposes of this timeframe, multiple permit requests from a single Attaching Entity within a rolling 30-day period shall be treated as a single request.~~

Rule 2.03 Make-Ready Work Estimate

- (a) If the Pole Owner grants an application for a Pole Attachment or Overlashing that requires Make-Ready Work, the Pole Owner shall provide a detailed list of Make-Ready Work to include a description of the work, the estimated number of days to complete, and a detailed list of the activities and materials to be used in the Make-Ready Work, along with a cost estimate, within 14 days from the date of approval, as provided for in Rule 2.02(f).
- (b) Within 15 days of the receipt of the Make-Ready Work estimate, the Attaching Entity shall provide a written response either accepting the estimate and making payment arrangements as provided in its contract with the Pole Owner, or if the Attaching Entity has any disagreement with

the Make-Ready Work estimate or the estimated number of days to complete the work, it shall provide, in writing, a list of any areas of disagreement to the Pole Owner. The Pole Owner will have 15 days from the receipt of the list to provide a response to the Attaching Entity. If the Attaching Entity and the Pole Owner cannot reach a resolution within 15 days from the date the owner's response is provided to the Attaching Entity, either party may file a complaint with the Commission pursuant to the terms of this rule.

- (c) If the Pole Owner approves an application that requires Make-Ready Work, the Pole Owner shall perform the Make-Ready Work at the Attaching Entity's expense.
- (d) Make-Ready Work shall be completed in a timely manner and at a reasonable cost and as soon as practicable after the date payment is received but not later than:

(1) ~~30 calendar~~60 days (90 days for attachments above the safety space) after the date payment is received for permit requests involving 10 or fewer poles including no more than 300 poles or 20 manholes; or

(2) ~~45~~75 days (105 days for attachments above the safety space) after the date payment is received for permit requests involving between 11 and 30 poles greater than the preceding limits but less than 3,000 poles and 100 manholes; or

~~(3) For requests involving more than thirty poles or where Make Ready Work will require more than 45 days from the date payment is received to complete, the Pole Owner and the Attaching Entity shall work in good faith to negotiate other mutually satisfactory conditions to complete the Make Ready Work.~~

If the permit requests exceed the preceding limits or where Make-Ready Work will require more than the above-referenced limit of days from the date payment is received to complete, the parties shall work in good faith to negotiate a mutually agreeable timeframe.

For purposes of this timeframe, multiple permit requests from a single Attaching Entity within a rolling 30-day period shall be treated as a single request.

- (e) If Make-Ready Work is not completed by the Pole Owner in a timely manner, the Attaching Entity may complete the applicable work that is within the communications space using a contractor approved by the Pole Owner. This Rule does not apply to any work that is within the electric space.

Rule 2.04 Denial of Access

- (a) A Pole Owner may deny access for a Pole Attachment on a nondiscriminatory basis where there is Insufficient Capacity or for reasons of safety, reliability, or generally applicable engineering standards as referenced in Rule 3.01(a).
- (b) A Pole Owner may deny access for a Pole Attachment to all facilities used exclusively for transmission on a nondiscriminatory basis.
- (c) The Pole Owner shall confirm in writing the denial of access for Pole Attachment or Overlashing as soon as practicable, but in no event later than ~~45 days following receipt of the request~~the applicable timeframe prescribed in Rule 2.02(f).
- (d) The Pole Owner's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to denial of access consistent with the provisions of Rule 2.04(a) and (b).

Rule 2.05 Notification

- (a) Except as provided for in Rule 2.05(b) or when a regulation, statute, ordinance or other similar legal requirement otherwise provides, a Pole Owner shall provide an Attaching Entity no less than 60 days written notice prior to:
 - (1) Removal or abandonment of the Pole Owner's facilities, except in situations outside the Pole Owner's control in which case it shall do so as soon as reasonably possible.
 - (2) Any modification of the Pole Owner's facilities other than routine maintenance or modification in response to emergencies or in situations outside the Pole Owner's control.
- (b) If removal or modification of facilities is required because of imminent danger to life or property, a Pole Owner shall have discretion to make that removal or modification without advance notice and shall provide verbal notice and subsequently confirm in writing, whatever action was taken as soon as practicable but in no event later than 10 days thereafter, except in extraordinary circumstances.

SECTION 3. SAFETY

Rule 3.01 Safety Responsibilities

An Attaching Entity shall:

- (a) Install and maintain its Pole Attachments and any Overlashing in compliance with:
 - (1) the current edition of the NESC and NEC in effect at the time of construction and the Pole Owner's applicable engineering standards related to safety and reliability in effect at the time of construction; and
 - (2) the codes, rules or regulations of any federal, state or local governing body having jurisdiction.
- (b) Remove idle facilities as soon as is reasonably practicable, but in no event more than 45 days after their replacement. This requirement does not apply when fiber optic cable is authorized to be overlashed to existing copper cable that becomes dormant as a result.
- (c) Repair, disconnect, isolate or otherwise correct any violation that poses an imminent danger to life or property immediately after discovery.
- (d) Upon receipt of a Pole Owner's notification of any safety violation, immediately correct a violation that poses imminent danger to life or property and correct other safety violations within ~~1030~~ days except in extraordinary circumstances or as mutually agreed. All reasonable costs associated with correcting undisputed safety violations shall be incurred by the party responsible for the violation.
- (e) Transfer or remove its Pole Attachments from utility poles that have been abandoned by the Pole Owner within 60 days of being notified of such abandonment. If Pole Attachments have not been removed after 60 days' notice, the Pole Owner may remove Attaching Entity Pole Attachments at the Attaching Entity's expense.

Rule 3.02 Safety Inspections

- (a) All Attaching Entities shall participate in a joint Safety Inspection with the Pole Owner, with each Attaching Entity bearing its own expense.
- (b) Pole Owners shall establish safety inspection schedules so that an inspection of all of the Pole Owner's Arkansas facilities will be completed

~~no more often than~~ at least every 5 years, but not more frequently than every 3 years.

- (c) Prior to engaging in a Safety Inspection, the Pole Owner shall provide 180 days advance written notice to the Attaching Entities.
- (d) All of the Pole Owner's inspection costs associated with a Safety Inspection shall be paid by the Attaching Entities and the Pole Owner. The Pole Owner shall be responsible for 25% of its inspection costs and the remaining 75% of the Pole Owner's inspection costs shall be paid by the Attaching Entities on a pro-rata basis, based on the number of poles each Attaching Entity occupies.
- (e) Prior to conducting a Safety Inspection, the Pole Owner and the Attaching Entities shall work in good faith to negotiate mutually agreeable terms of the Safety Inspection.

Rule 3.03 Pole Attachment Audits

- (a) All Attaching Entities shall participate in a joint Pole Attachment Audit with the Pole Owner, with each Attaching Entity bearing its own expense.
- (b) Pole Owners shall establish Pole Attachment Audit schedules so that an Audit of all of the Pole Owner's Arkansas facilities will be completed ~~no more often than every 3 years, but in no event may the audit of these facilities take longer than 5 years~~ at least every five years, but not more frequently than every 3 years.
- (c) Prior to engaging in a Pole Attachment Audit, the Pole Owner shall provide 180 days advance written notice to the Attaching Entities.
- (d) All of the Pole Owner's audit costs associated with a Pole Attachment Audit shall be paid by the Attaching Entities and the Pole Owner. The Pole Owner shall be responsible for twenty-five percent (25%) of its attachment audit costs and the remaining seventy-five percent (75%) of the Pole Owner's attachment audit costs shall be paid by the Attaching Entities on a pro-rata basis, based on the number of poles each Attaching Entity occupies.
- (e) Prior to conducting a Pole Attachment Audit, the Pole Owner and the Attaching Entities shall work in good faith to negotiate mutually agreeable terms of the Pole Attachment Audit.
- (f) Additional equipment that is normally required by the presence of a Pole Attachment in the Attaching Entity's Usable Space and equipment placed in the Unusable Space, which is used in conjunction with the Pole Attachment and to the extent is allowed by the Pole Owner, is not an additional Pole Attachment for rental rate purposes.

SECTION 4. RATE FORMULAS AND MODIFICATION COSTS

Rule 4.01 Pole Attachment Rate Formula

- (a) When the parties fail to reach a voluntarily negotiated written agreement regarding the Pole Attachment rate and the complaint procedures under Section 5 of these Rules are invoked, the Commission will apply the formula in Appendix A of the Rules for determining the maximum just and reasonable rate.
- (b) The investments and expenses used in the Pole Attachment rate formula shall be based on historical or original cost.
- (c) The Pole Owner's net pole investment shall be adjusted to eliminate the investment in crossarms and other costs not associated with owning a pole. There is a rebuttable presumption that these costs are equal to 15% of net investment for electric utilities and 5% for telephone companies.
- (d) When the net pole investment is zero or negative, the gross investment may be substituted for the net investment in Appendix A, except for the Return Element of the carrying charges which is always a net calculation- The Return Element shall be calculated as follows:

$$\text{Return Element} = 8.00\% \times \text{Net Pole Investment} \div \text{Gross Pole Investment}$$

- (e) The following rebuttable presumptions are used in the calculation of the space factor:
 - (1) The height of a pole is equal to 37.5 feet.
 - (2) Usable Space on the pole is equal to 10.17 feet.
 - (3) Unusable Space on the pole is equal to 27.33 feet, which includes the Safety Space.
 - (4) Occupied Usable Space is:
 - (A) Cable television service is equal to ± one (1) foot.
 - (B) Telecommunications service is equal to ± one (1) foot.
 - (5) The presumptive average number of attachers on a pole is equal to three (3), which includes the Pole Owner.
 - (6) A Pole Owner may only challenge the presumptive average number of attachers in Rule 4.01(e)(5), upon a showing that:

- (A) ~~The Each~~ Pole Owner upon request, provided all Attaching Entities and all entities seeking access, the methodology and information upon which the Pole Owner's average number of attachers is based,
 - (B) ~~The Each~~ Pole Owner exercised good faith in establishing and updating its average number of attachers, and
 - (C) The methodology used to demonstrate why the presumptive number is incorrect.
- (7) An Attaching Entity may only challenge the presumptive average number of attachers in Rule 4.01(e)(5) or the average number of attachers propounded by the Pole Owner pursuant to Rule 4.01(e)(6), upon a showing of:
- (A) information demonstrating why the Pole Owner's average is incorrect, and
 - (B) what the Attaching Entity believes should be the average and the methodology used to obtain that average. Where a complete inspection is impractical, a statistically sound survey may be submitted.
- (8) Upon successful challenge of the existing average number of attachers pursuant to Rule 4.01(e)(6) or (7), the resulting data determined shall be used by the utility as the number of attachers within the rate formula.
- (f) The presumptions in 4.01(e)(1)-(4) may be rebutted by either the Pole Owner or the Attaching Entity.

Rule 4.02 Duct/Conduit Rate Formula

- (a) When the parties fail to reach a voluntarily negotiated written agreement regarding the Duct/Conduit rate and the Commission's complaint procedures under Section 5 are invoked, the Commission will apply the formula in Appendix A of the Rules for determining the maximum just and reasonable rate.
- (b) The investments and expenses used in the Duct/Conduit rate formula shall be based on historical or original cost.
- (c) In the calculation of the percentage of Conduit capacity occupied, if no Inner-Duct is installed in the Conduit, the number of Inner-Ducts is presumed to be ~~two~~ (2).

Rule 4.03 **Modification Costs**

Pole Owners shall charge Attaching Entities separately for the following:

- (a) Make-Ready Work pursuant to Rule 2.03.
- (b) (1) Solely Assigned; Excess Height. When an Attaching Entity, including the Pole Owner, except as provided for under Rule 2.02(d), requires additional space which is not available on that pole, and the pole must be replaced by a taller pole, the entity causing the need for replacement shall pay for the replacement cost of such pole, including the cost of removing the old pole, less any salvage value plus the costs of transferring the facilities of all other attachers.
- (12) Mutual Assignment. When a taller pole is required by two or more Attaching Entities, including the Pole Owner, except as provided under Rule 2.02(d), the costs identified in Rule 4.03(b) shall be shared equally among the entities requiring the replacement.
- (c) Rearrangements. Except as provided for under Rule 2.02(e), an entity that obtains a Pole Attachment shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity.

SECTION 5. COMPLAINT PROCEDURES

Rule 5.01 Time for Resolution

The Commission shall resolve any formal complaint filed in accordance with these Rules and the Commission's *Rules of Practice and Procedure* within 180 days after the complaint is filed, except that the Commission, for good cause shown, may extend the time for resolution up to 360 days after the complaint is filed.

Rule 5.02 Informal Resolution

- (a) Before filing a formal complaint, every complainant shall make a good faith effort to informally resolve the dispute with the respondent.
- (b) The complainant and respondent shall, within 30 ~~calendar~~ days of a request by the other for data relevant to the situation, provide the data that is publicly available.
- (c) An entity shall not be required to submit data that is not publicly available until the other entity agrees, in writing, that it will use that information only for purposes of resolving the dispute and will not disclose that information except as may be required by the Commission.

Rule 5.03 Filing Requirements

The formal complaint shall be filed in compliance with the Commission's Rules of Practice and Procedure and meet the following requirements:

- ~~(a) — The complaint shall be accompanied by supporting written testimony and exhibits of a person or persons with actual knowledge of the facts and any exhibits provided in support of complaint testimony shall be verified by the person providing the exhibit.~~
- ~~(b) — Workpapers and documentation shall be provided to all parties at the time of the filing of the complaint that are sufficient to support all information required by this Section.~~
- (ae) The complaint shall be accompanied by a copy of the Pole Attachment agreement, if any, between the Attaching Entity and the Pole Owner.
- ~~(bd) The Pole Owner or Attaching Entity shall state with specificity in its complaint the section(s) of these Rules or Ark. Code Ann. § 23-4-1001 et seq. that is(are) claimed to be violated, or, if a written Pole Attachment agreement already exists, the rate(s), term(s), or condition(s) of that agreement that is(are) claimed to have been violated. The complaint shall state with specificity the section(s) of these Rules, Ark. Code Ann. §§ 23-4-1001 et seq., or the agreement that is (are) claimed to have been violated.~~

- (ce) The complaint shall include the data and information necessary to support the claim, including where applicable, the data and information necessary to calculate the rate pursuant to Appendix A.
- (df) No complaint filed by an Attaching Entity shall be dismissed for failure to provide the information and data required in Rule 5.03(e), if the Pole Owner has failed to provide such information and data after a reasonable request.
- (eg) In a case where a claimant alleges that it has been denied access to a pole, Duct, or Conduit despite a written request for such access, the complaint shall include the data and information necessary to support the allegations, including:
 - (1) The reasons given for the denial of access to the Pole Owner's poles, Ducts or Conduits;
 - (2) The basis for the complainant's allegation that the denial of access is improper;
 - (3) The remedy sought by the complainant;
 - (4) A copy of the written request to the Pole Owner for access to its poles, Ducts, or Conduits; and
 - (5) A copy of the Pole Owner's response to the written request including all information given by the Pole Owner to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a Pole Owner's written response, or if the Pole Owner denies the complainant any other information reasonably needed to establish its prima facie case.
- (f) The source of data and information required under this Section shall be identified. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.
- (g) The complaint shall include a brief summary of all steps taken to informally resolve the problem prior to filing.
- (h) If any of the information filed or provided under this Rule is data that is publically unavailable and which was provided pursuant to Rule 5.02(c):
 - (1) The complainant shall not file or otherwise include such data with the complaint, but the complaint shall generically describe the data.

- (2) The complainant shall include a notice to the respondent that the complainant intends to use the data in the complaint proceeding.
- (3) If the respondent desires to protect the data from public disclosure, the respondent shall have 20 days from the date of service of the complaint to file a motion for protective order pursuant to the Commission's Rules of Practice and Procedure.
- (4) If the respondent has not filed a motion for protective order within 20 days from the date of service of the complaint, the complainant shall file the data as a supplement to its complaint.

Rule 5.04 Response and Reply

- ~~(a) Respondent shall have 30 days from the date the complaint was filed to file a response.~~
- ~~(b) The response shall address each of the complainant's allegations. Responses shall be supported by written testimony of a person or persons with actual knowledge of the facts and any exhibits provided in support of response testimony shall be verified by the person providing the exhibit.~~
- ~~(c) Complainant shall have 20 days from the date the response filed to file a reply.~~
- ~~(d) The complainant's reply shall address each of the respondent's responses. The reply shall be supported by written testimony of a person or persons with actual knowledge of the facts and any exhibits provided in support of reply testimony shall be verified by the person providing the exhibit.~~
- (a) The complaint shall be served on respondent pursuant to Rule 9.02 of the Commission's Rules of Practice and Procedure.
- (b) Respondent may file a response pursuant to Rule 9.02 of the Commission's Rules of Practice and Procedure.
- (c) Thereafter, the Commission may adopt a procedural schedule for the filing of written testimony with or without a hearing, as appropriate.

**Pole Attachment Rate Formula
And
Conduit Rate Formula**

Appendix A

**Pole Attachment Rate Formula
Local Exchange Carrier Pole Owners
FCC Part 32 Accounts**

$$\text{Maximum Per Pole Rate} = \text{Space Factor} \times \text{Net Cost of A Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Space Factor} = \frac{\text{Occupied Space} + \left[\frac{2}{3} \times \left(\frac{\text{Unusable Space}}{\text{No. of Attachers (including the Public Utility pole owner)}} \right) \right]}{\text{Pole Height}}$$

$$\text{Net Cost of A Bare Pole} = \frac{\text{Net Pole Investment} \times 95\%}{\text{Total Number of Poles}}$$

$$\text{Net Pole Investment} = \text{Gross Pole Investment (Account 2411)} - \text{Accumulated Depreciation (Account 3100)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Poles)}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\text{Gross Plant Investment (Account 2001) - Accumulated Depreciation (Account 3100) - Accumulated Deferred Taxes (Plant) (Accounts 4100+4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 6411 - Rental Expense (Poles)}}{\text{Net Pole Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 2411)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\text{Gross Plant Investment (Account 2001) - Accumulated Depreciation (Account 3100) - Accumulated Deferred Taxes (Plant)(Accounts 4100+4340)}}$$

$$\text{Return Element} = 8.00\%$$

**Pole Attachment Rate Formula
Electric Utility Pole Owners
FERC Part 101 Accounts**

$$\text{Maximum Per Pole Rate} = \text{Space Factor} \times \text{Net Cost of A Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Space Factor} = \frac{\text{Occupied Space} + \left[\frac{2}{3} \times \left(\frac{\text{Unusable Space}}{\text{No. of Attachers (including the Public Utility pole owner)}} \right) \right]}{\text{Pole Height}}$$

$$\text{Net Cost of A Bare Pole} = \frac{\text{Net Pole Investment} \times 85\%}{\text{Total Number of Poles}}$$

$$\text{Net Pole Investment} = \frac{\text{Gross Pole Investment (Account 364)} - \text{Accumulated Depreciation (Account 108)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 190, 281 - 283)(Poles)}}{1}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (per FERC Form 1)}}{\frac{\text{Gross Plant Investment (per FERC Form 1)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190, 281 - 283)}}{1}}$$

$$\text{Maintenance Element} = \frac{\text{Account 593}}{\frac{\text{Pole Investment in Accts. 364,365 \& 369} - \text{Depreciation (Poles) Related to Accts. 364,365 \& 369} - \text{Accumulated Deferred Inc. Taxes Related to Accts. 364,365 \& 369}}{1}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 364)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1, + 409.1 + 410.1 + 411.4 - 411.1}}{\frac{\text{Gross Plant Investment (per FERC Form 1)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant)(Account 190, 281-283)}}{1}}$$

$$\text{Return Element} = 8.00\%$$

**Conduit Rate Formula
Local Exchange Carrier Conduit Owners
FCC Part 32 Accounts**

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Capacity Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \text{Carrying Charge Rate}$$

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Capacity Occupied}} = \frac{1 \text{ Duct}}{\text{Number of Inner Ducts}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} = \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Investment}} - \frac{\text{Accumulated Depreciation (Account 3100)(Conduit)}}{\text{(Account 3100)(Conduit)}} - \frac{\text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Conduit)}}{\text{Income Taxes (Account 4100 + 4340)(Conduit)}}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\frac{\text{Gross Plant Investment - Accumulated Depreciation - Accumulated Deferred Taxes (Plant)}}{\text{(Account 2001) (Account 3100) (Accounts 4100+4340)}}}$$

$$\text{Maintenance Element} = \frac{\text{Conduit Maintenance Expense (Account 6441)}}{\text{Net Conduit Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\frac{\text{Gross Plant Investment - Accumulated Depreciation - Accumulated Deferred Taxes (Plant)(Accounts 4100+4340)}}{\text{(Account 2001) (Account 3100) (Plant)(Accounts 4100+4340)}}}$$

$$\text{Return Element} = 8.00\%$$

**Conduit Rate Formula
Electric Utility Conduit Owners
FERC Part 101 Accounts**

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Capacity Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \text{Carrying Charge Rate}$$

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Capacity Occupied}} = \frac{1 \text{ Duct}}{\text{Number of Inner Ducts}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} = \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 366)} - \text{Accumulated Depreciation (Account 108)(Conduit)} - \text{Accumulated Deferred Income Taxes (Conduit) (Account 190, 281 - 283)}}{\text{Conduit}}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (per FERC Form 1)}}{\frac{\text{Gross Plant Investment (per FERC Form 1)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190, 281 - 283)}}{\text{Conduit}}}$$

$$\text{Maintenance Element} = \frac{\text{Account 594}}{\frac{\text{Conduit Investment in Accts. 366,367 \& 369} - \text{Depreciation (Conduit) in Accts. 366,367 \& 369} - \text{Accumulated Deferred Inc. Taxes Related to Accts. 366,367 \& 369}}{\text{Conduit}}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 366)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1, + 409.1 + 410.1 + 411.4 - 411.1}}{\frac{\text{Gross Plant Investment (per FERC Form 1)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant)(Account 190, 281-283)}}{\text{Conduit}}}$$

$$\text{Return Element} = 8.00\%$$

Arkansas Public Service Commission



Pole Attachment Rules

Last Revised: June 24, 2016
Order No. 5
Docket No. 15-019-R
Effective: xx-xx-2016

POLE ATTACHMENT RULES

ADMINISTRATIVE HISTORY

<u>Docket</u>	<u>Date</u>	<u>Order No.</u>	<u>Subject Matter of Docket / Order</u>
08-073-R	07-30-08	5	Adopts rules relating to the rates, terms, and conditions upon which a Public Utility pole owner shall provide access for a Pole Attachment to comply with Ark. Code Ann. § 23-4-1001 through § 23-4-1006 (Act 740 of 2007).
15-019-R	XX-XX-16	5	Amends Definitions and moves to Section 1; amends Section 1; adopts new Sections 2, 3, & 4; renumbers Section 2 to Section 5 and amends.

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SECTION 1. PURPOSE, APPLICABILITY, AND GENERAL MATTERS

Rule 1.01 Definitions

The following definitions shall apply throughout the *Pole Attachment Rules* (PARs) except as otherwise required by the context and any references to the PARs shall include these definitions:

- (a) “Attaching Entity.” A provider of electric service, telecommunication service, cable television service, internet access service or other related information services. The term "Attaching Entity" does not include a Pole Owner to the extent that it makes Pole Attachments to its own poles, Ducts, or Conduits.
- (b) “Conduit.” A structure containing one or more Ducts, usually placed in the ground, in which cables or wires may be installed.
- (c) “Duct.” A single enclosed raceway for conductors, cable or wire.
- (d) “Inner-Duct.” A Duct-like raceway smaller than a Duct that is inserted into a Duct so that the Duct may carry multiple wires or cables.
- (e) “Insufficient Capacity.” The inability of a Pole Owner to accommodate a new Pole Attachment or Overlapping through the performance of Make-Ready Work.
- (f) “Make-Ready Work.” Engineering or construction activities necessary to make a pole, Duct, Conduit, or other support equipment available for a new Pole Attachment, Pole Attachment modifications, or additional facilities.
- (g) “NEC.” The National Electrical Code published by the National Fire Protection Association.
- (h) “NESC.” The American National Standards Institute’s National Electrical Safety Code published by the Institute of Electrical and Electronics Engineers, Inc.
- (i) “Overlapping.” The placement of telecommunications provider, cable television service, or internet access service facilities on existing facilities that already are attached within the Usable Space allocated to an existing Attaching Entity. Overlapping is not considered a separate Pole Attachment.
- (j) “Pole Attachment.” As defined in Ark. Code Ann. § 23-4-1001(1).
- (k) “Pole Attachment Audit.” Any audit done at the option of the Pole Owner

to count the number of Pole Attachments by one or more Attaching Entities.

- (l) "Pole Owner." A public utility as defined in Ark. Code Ann. § 23-4-1001(2), having ownership or control of a pole, Duct, or Conduit.
- (m) "Safety Inspection." Any inspection done at the option of the Pole Owner to ensure Pole Attachments comply with applicable safety standards.
- (n) "Safety Space." As defined in the current issue of the NESC, the space located between the areas to which electric conductors and communication circuitry may be attached.
- (o) "Service Drop." A connection from distribution facilities to the building or structure being served that does not require guys under standard industry design practice.
- (p) "Unusable Space." The Unusable Space is equal to the length of the pole minus the Usable Space. Safety Space is included in Unusable Space.
- (q) "Usable Space." The space above minimum grade level available for circuit, communications, coaxial cable, fiber optic, or electrical conductor Pole Attachments, by Public Utilities and Attaching Entities.

Rule 1.02 Authority

These Rules are promulgated pursuant to, and in accordance with, the provisions of Act 740 of 2007 as codified in Ark. Code Ann. § 23-4-1001 through § 23-4-1006.

Rule 1.03 Applicability

These Rules apply to Pole Owners and Attaching Entities as defined in these Rules.

Rule 1.04 Purpose and Scope

These Rules govern the Commission's regulation of the rates, terms, and conditions upon which a Pole Owner shall provide nondiscriminatory access for a Pole Attachment in the absence of a voluntarily negotiated agreement. These Rules also govern the procedures necessary and appropriate to hear and resolve complaints arising from the failure or refusal to provide access, the inability of a Pole Owner and an entity seeking access for a Pole Attachment to reach a voluntary negotiated written agreement, and disputes over implementation of an existing contract.

Rule 1.05 Negotiated Agreements

Nothing in these Rules prevents or limits the ability of a Pole Owner and an Attaching Entity to enter into a voluntarily negotiated written agreement regarding the rates,

terms, and conditions for Pole Attachment access. Voluntarily negotiated agreements are preferred and encouraged by the Commission. Nothing in these rules shall be interpreted to supersede or modify any lawful rate, term, or condition of a voluntarily negotiated written agreement.

Rule 1.06 Communications

Pole Owners and Attaching Entities are encouraged to employ consistent and compatible communications systems for the purpose of notification and coordination associated with the Pole Attachments addressed in these rules.

SECTION 2. ACCESS AND NOTIFICATION

Rule 2.01 Contracts and Permits

- (a) Prior to installing a Pole Attachment, the Pole Owner and the Attaching Entity shall have a written contract that specifies the rates, terms, and conditions for the Pole Attachments.
- (b) An Attaching Entity shall have a permit from the Pole Owner, except as provided in Rule 2.01(c), for each Pole Attachment, including a permit covering any Overlashing, subject to the provisions of Rule 2.03 and Rule 2.04.
- (c) An Attaching Entity may install a Service Drop without first obtaining a separate permit for that Service Drop if the Service Drop can be installed by the Attaching Entity in compliance with Rule 3.01(a). The Attaching Entity shall account for and report the installation of Service Drops in compliance with the written contract for service as required by Rule 2.01(a).
- (d) Prior to the assignment, in whole or in part, of an existing Pole Attachment agreement, an Attaching Entity shall notify the Pole Owner of the assignment.
- (e) The Pole Owner shall notify all affected Attaching Entities of the sale or transfer of ownership of any pole.
- (f) The Pole Owner and the Attaching Entity shall exchange and maintain current contact information for both routine business and emergency notification, including but not limited to, name, telephone number, email address, and street address. Participation in a communication system consistent with Rule 1.06 is encouraged to facilitate this information exchange.
- (g) Pole Owners and Attaching Entities shall make a good faith effort to begin negotiations of the terms and conditions of a new agreement no less than ninety (90) days prior to the expiration of the current contract.

Rule 2.02 Request for Access

- (a) Requests to a Pole Owner for a Pole Attachment or Overlashing permit shall be in writing. The Pole Owner may require the applicant to provide the following technical information:
 - (1) The location of the pole, Duct, or Conduit for which the attachment or occupancy is requested;

- (2) The amount of space requested;
- (3) The number and type of attachment for each pole, Duct, or Conduit addition;
- (4) The physical characteristics of the attachment or addition;
- (5) The attachment location on the pole or in the Duct or Conduit;
- (6) The proposed route;
- (7) The proposed schedule for construction; and
- (8) Any other information reasonably required by the Pole Owner and which is necessary to process the request.

A request containing the information set forth in items (1) – (8) above shall be considered to be a complete request for purposes of Rule 2.02(f).

- (b) An Attaching Entity wishing to overlash facilities shall submit a written request to the Pole Owner identifying the size and type of facilities to be overlashed, the size and type of facilities to be added, the poles over which such facilities will be overlashed, and when such facilities will be overlashed. In cases where a party is seeking to overlash facilities to another attaching entity, the party seeking to overlash shall also provide the Pole Owner evidence of the written consent of such host party.
- (c) The Pole Owner shall identify and account for the incremental engineering costs associated with a request for a Pole Attachment or Overlashing permit and the cost of estimating Make-Ready Work. A Pole Owner may charge an Attaching Entity incremental administrative costs associated with a request for a Pole Attachment or Overlashing permit and the cost of estimating Make-Ready Work, provided that the Pole Owner identifies and accounts for such incremental administrative costs. The Attaching Entity shall pay to the Pole Owner any incremental engineering costs or incremental administrative costs incurred and charged by the Pole Owner in connection with a request for a Pole Attachment or Overlashing permit, regardless of whether the Attaching Entity's request is rejected or withdrawn by the Attaching Entity.
- (d) A Pole Owner may reserve available space on its facilities for future provision of its core utility service, but must permit the use of such reserved space by Attaching Entities on an interim basis until the Pole Owner has an actual need for the space. The Pole Owner shall provide written notification to the Attaching Entity when a permit is being issued for the use of reserved space.

- (e) Within 60 days of written notification that the space is needed by the Pole Owner, the interim Attaching Entity must vacate the occupied space at its own expense and pay for any modifications needed to maintain the attachment or pay for the expansion of capacity.
- (f) The Pole Owner shall approve, deny, or conditionally approve with Make-Ready Work provisions, the request for a Pole Attachment or Overlapping in writing as soon as practicable, but in no event later than:
 - (1) 45 days after receipt of a complete permit request, for requests including no more than 300 poles or 20 manholes; or
 - (2) 60 days after receipt of a complete permit request, for requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

If the permit request exceeds the preceding limits, the parties shall work in good faith to negotiate a mutually agreeable timeframe.

For purposes of this timeframe, multiple permit requests from a single Attaching Entity within a rolling 30-day period shall be treated as a single request.

Rule 2.03 Make-Ready Work Estimate

- (a) If the Pole Owner grants an application for a Pole Attachment or Overlapping that requires Make-Ready Work, the Pole Owner shall provide a detailed list of Make-Ready Work to include a description of the work, the estimated number of days to complete, and a detailed list of the activities and materials to be used in the Make-Ready Work, along with a cost estimate, within 14 days from the date of approval, as provided for in Rule 2.02(f).
- (b) Within 15 days of the receipt of the Make-Ready Work estimate, the Attaching Entity shall provide a written response either accepting the estimate and making payment arrangements as provided in its contract with the Pole Owner, or if the Attaching Entity has any disagreement with the Make-Ready Work estimate or the estimated number of days to complete the work, it shall provide, in writing, a list of any areas of disagreement to the Pole Owner. The Pole Owner will have 15 days from the receipt of the list to provide a response to the Attaching Entity. If the Attaching Entity and the Pole Owner cannot reach a resolution within 15 days from the date the owner's response is provided to the Attaching Entity, either party may file a complaint with the Commission pursuant to the terms of this rule.

- (c) If the Pole Owner approves an application that requires Make-Ready Work, the Pole Owner shall perform the Make-Ready Work at the Attaching Entity's expense.
- (d) Make-Ready Work shall be completed in a timely manner and at a reasonable cost and as soon as practicable after the date payment is received but not later than:
 - (1) 60 days (90 days for attachments above the safety space) after the date payment is received for permit requests including no more than 300 poles or 20 manholes; or
 - (2) 75 days (105 days for attachments above the safety space) after the date payment is received for permit requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

If the permit requests exceed the preceding limits or where Make-Ready Work will require more than the above-referenced limit of days from the date payment is received to complete, the parties shall work in good faith to negotiate a mutually agreeable timeframe.

For purposes of this timeframe, multiple permit requests from a single Attaching Entity within a rolling 30-day period shall be treated as a single request.

- (e) If Make-Ready Work is not completed by the Pole Owner in a timely manner, the Attaching Entity may complete the applicable work that is within the communications space using a contractor approved by the Pole Owner. This Rule does not apply to any work that is within the electric space.

Rule 2.04 Denial of Access

- (a) A Pole Owner may deny access for a Pole Attachment on a nondiscriminatory basis where there is Insufficient Capacity or for reasons of safety, reliability, or generally applicable engineering standards as referenced in Rule 3.01(a).
- (b) A Pole Owner may deny access for a Pole Attachment to all facilities used exclusively for transmission on a nondiscriminatory basis.
- (c) The Pole Owner shall confirm in writing the denial of access for Pole Attachment or Overlashing as soon as practicable, but in no event later than the applicable timeframe prescribed in Rule 2.02(f).
- (d) The Pole Owner's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain

how such evidence and information relate to denial of access consistent with the provisions of Rule 2.04(a) and (b).

Rule 2.05 **Notification**

- (a) Except as provided for in Rule 2.05(b) or when a regulation, statute, ordinance or other similar legal requirement otherwise provides, a Pole Owner shall provide an Attaching Entity no less than 60 days written notice prior to:
 - (1) Removal or abandonment of the Pole Owner's facilities, except in situations outside the Pole Owner's control in which case it shall do so as soon as reasonably possible.
 - (2) Any modification of the Pole Owner's facilities other than routine maintenance or modification in response to emergencies or in situations outside the Pole Owner's control.
- (b) If removal or modification of facilities is required because of imminent danger to life or property, a Pole Owner shall have discretion to make that removal or modification without advance notice and shall provide verbal notice and subsequently confirm in writing, whatever action was taken as soon as practicable but in no event later than 10 days thereafter, except in extraordinary circumstances.

SECTION 3. SAFETY

Rule 3.01 Safety Responsibilities

An Attaching Entity shall:

- (a) Install and maintain its Pole Attachments and any Overlashing in compliance with:
 - (1) The current edition of the NESC and NEC in effect at the time of construction and the Pole Owner's applicable engineering standards related to safety and reliability in effect at the time of construction; and
 - (2) The codes, rules or regulations of any federal, state or local governing body having jurisdiction.
- (b) Remove idle facilities as soon as is reasonably practicable, but in no event more than 45 days after their replacement. This requirement does not apply when fiber optic cable is authorized to be overlashed to existing copper cable that becomes dormant as a result.
- (c) Repair, disconnect, isolate or otherwise correct any violation that poses an imminent danger to life or property immediately after discovery.
- (d) Upon receipt of a Pole Owner's notification of any safety violation, immediately correct a violation that poses imminent danger to life or property and correct other safety violations within 30 days except in extraordinary circumstances or as mutually agreed. All reasonable costs associated with correcting undisputed safety violations shall be incurred by the party responsible for the violation.
- (e) Transfer or remove its Pole Attachments from utility poles that have been abandoned by the Pole Owner within 60 days of being notified of such abandonment. If Pole Attachments have not been removed after 60 days' notice, the Pole Owner may remove Attaching Entity Pole Attachments at the Attaching Entity's expense.

Rule 3.02 Safety Inspections

- (a) All Attaching Entities shall participate in a joint Safety Inspection with the Pole Owner, with each Attaching Entity bearing its own expense.
- (b) Pole Owners shall establish safety inspection schedules so that an inspection of all of the Pole Owner's Arkansas facilities will be completed at least every 5 years, but not more frequently than every 3 years.

- (c) Prior to engaging in a Safety Inspection, the Pole Owner shall provide 180 days advance written notice to the Attaching Entities.
- (d) All of the Pole Owner's inspection costs associated with a Safety Inspection shall be paid by the Attaching Entities and the Pole Owner. The Pole Owner shall be responsible for 25% of its inspection costs and the remaining 75% of the Pole Owner's inspection costs shall be paid by the Attaching Entities on a pro-rata basis, based on the number of poles each Attaching Entity occupies.
- (e) Prior to conducting a Safety Inspection, the Pole Owner and the Attaching Entities shall work in good faith to negotiate mutually agreeable terms of the Safety Inspection.

Rule 3.03 Pole Attachment Audits

- (a) All Attaching Entities shall participate in a joint Pole Attachment Audit with the Pole Owner, with each Attaching Entity bearing its own expense.
- (b) Pole Owners shall establish Pole Attachment Audit schedules so that an Audit of all of the Pole Owner's Arkansas facilities will be completed at least every five years, but not more frequently than every 3 years.
- (c) Prior to engaging in a Pole Attachment Audit, the Pole Owner shall provide 180 days advance written notice to the Attaching Entities.
- (d) All of the Pole Owner's audit costs associated with a Pole Attachment Audit shall be paid by the Attaching Entities and the Pole Owner. The Pole Owner shall be responsible for twenty-five percent (25%) of its attachment audit costs and the remaining seventy-five percent (75%) of the Pole Owner's attachment audit costs shall be paid by the Attaching Entities on a pro-rata basis, based on the number of poles each Attaching Entity occupies.
- (e) Prior to conducting a Pole Attachment Audit, the Pole Owner and the Attaching Entities shall work in good faith to negotiate mutually agreeable terms of the Pole Attachment Audit.
- (f) Additional equipment that is normally required by the presence of a Pole Attachment in the Attaching Entity's Usable Space and equipment placed in the Unusable Space, which is used in conjunction with the Pole Attachment and to the extent is allowed by the Pole Owner, is not an additional Pole Attachment for rental rate purposes.

SECTION 4. RATE FORMULAS AND MODIFICATION COSTS

Rule 4.01 Pole Attachment Rate Formula

- (a) When the parties fail to reach a voluntarily negotiated written agreement regarding the Pole Attachment rate and the complaint procedures under Section 5 of these Rules are invoked, the Commission will apply the formula in Appendix A of the Rules for determining the maximum just and reasonable rate.
- (b) The investments and expenses used in the Pole Attachment rate formula shall be based on historical or original cost.
- (c) The Pole Owner's net pole investment shall be adjusted to eliminate the investment in crossarms and other costs not associated with owning a pole. There is a rebuttable presumption that these costs are equal to 15% of net investment for electric utilities and 5% for telephone companies.
- (d) When the net pole investment is zero or negative, the gross investment may be substituted for the net investment in Appendix A, except for the Return Element of the carrying charges which is always a net calculation- The Return Element shall be calculated as follows:

$$\text{Return Element} = 8.00\% \times \text{Net Pole Investment} \div \text{Gross Pole Investment}$$

- (e) The following rebuttable presumptions are used in the calculation of the space factor:
 - (1) The height of a pole is equal to 37.5 feet.
 - (2) Usable Space on the pole is equal to 10.17 feet.
 - (3) Unusable Space on the pole is equal to 27.33 feet, which includes the Safety Space.
 - (4) Occupied Usable Space is:
 - (A) Cable television service is equal to one (1) foot.
 - (B) Telecommunications service is equal to one (1) foot.
 - (5) The presumptive average number of attachers on a pole is equal to three (3), which includes the Pole Owner.

- (6) A Pole Owner may only challenge the presumptive average number of attachers in Rule 4.01(e)(5), upon a showing that:
 - (A) The Pole Owner upon request, provided all Attaching Entities and all entities seeking access, the methodology and information upon which the Pole Owner's average number of attachers is based,
 - (B) The Pole Owner exercised good faith in establishing and updating its average number of attachers, and
 - (C) The methodology used to demonstrate why the presumptive number is incorrect.
- (7) An Attaching Entity may only challenge the presumptive average number of attachers in Rule 4.01(e)(5) or the average number of attachers propounded by the Pole Owner pursuant to Rule 4.01(6), upon a showing of:
 - (A) Information demonstrating why the Pole Owner's average is incorrect, and
 - (B) What the Attaching Entity believes should be the average and the methodology used to obtain that average. Where a complete inspection is impractical, a statistically sound survey may be submitted.
- (8) Upon successful challenge of the existing average number of attachers pursuant to Rule 4.01(e)(6) or (7), the resulting data determined shall be used by the utility as the number of attachers within the rate formula.
- (f) The presumptions in 4.01(e)(1)-(4) may be rebutted by either the Pole Owner or the Attaching Entity.

Rule 4.02 Duct/Conduit Rate Formula

- (a) When the parties fail to reach a voluntarily negotiated written agreement regarding the Duct/Conduit rate and the Commission's complaint procedures under Section 5 are invoked, the Commission will apply the formula in Appendix A of the Rules for determining the maximum just and reasonable rate.
- (b) The investments and expenses used in the Duct/Conduit rate formula shall be based on historical or original cost.

- (c) In the calculation of the percentage of Conduit capacity occupied, if no Inner-Duct is installed in the Conduit, the number of Inner-Ducts is presumed to be two (2).

Rule 4.03 Modification Costs

Pole Owners shall charge Attaching Entities separately for the following:

- (a) Make-Ready Work pursuant to Rule 2.03.
- (b)
 - (1) Solely Assigned; Excess Height. When an Attaching Entity, including the Pole Owner, except as provided for under Rule 2.02(d), requires additional space which is not available on that pole, and the pole must be replaced by a taller pole, the entity causing the need for replacement shall pay for the replacement cost of such pole, including the cost of removing the old pole, less any salvage value plus the costs of transferring the facilities of all other attachers.
 - (2) Mutual Assignment. When a taller pole is required by two or more Attaching Entities, including the Pole Owner, except as provided under Rule 2.02(d), the costs identified in Rule 4.03(b) shall be shared equally among the entities requiring the replacement.
- (c) Rearrangements. Except as provided for under Rule 2.02(e), an entity that obtains a Pole Attachment shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity.

SECTION 5. COMPLAINT PROCEDURES

Rule 5.01 **Time for Resolution**

The Commission shall resolve any formal complaint filed in accordance with these Rules and the Commission's *Rules of Practice and Procedure* within 180 days after the complaint is filed, except that the Commission, for good cause shown, may extend the time for resolution up to 360 days after the complaint is filed.

Rule 5.02 **Informal Resolution**

- (a) Before filing a formal complaint, every complainant shall make a good faith effort to informally resolve the dispute with the respondent.
- (b) The complainant and respondent shall, within 30 days of a request by the other for data relevant to the situation, provide the data that is publicly available.
- (c) An entity shall not be required to submit data that is not publicly available until the other entity agrees, in writing, that it will use that information only for purposes of resolving the dispute and will not disclose that information except as may be required by the Commission.

Rule 5.03 **Filing Requirements**

The formal complaint shall be filed in compliance with the Commission's Rules of Practice and Procedure and meet the following requirements:

- (a) The complaint shall be accompanied by a copy of the Pole Attachment agreement, if any, between the Attaching Entity and the Pole Owner.
- (b) The complaint shall state with specificity the section(s) of these Rules, Ark. Code Ann. §§ 23-4-1001 *et seq.*, or the agreement that is (are) claimed to have been violated.
- (c) The complaint shall include the data and information necessary to support the claim, including where applicable, the data and information necessary to calculate the rate pursuant to Appendix A.
- (d) No complaint filed by an Attaching Entity shall be dismissed for failure to provide the information and data required in Rule 5.03(e), if the Pole Owner has failed to provide such information and data after a reasonable request.
- (e) In a case where a claimant alleges that it has been denied access to a pole, Duct, or Conduit despite a written request for such access, the complaint

shall include the data and information necessary to support the allegations, including:

- (1) The reasons given for the denial of access to the Pole Owner's poles, Ducts or Conduits;
 - (2) The basis for the complainant's allegation that the denial of access is improper;
 - (3) The remedy sought by the complainant;
 - (4) A copy of the written request to the Pole Owner for access to its poles, Ducts, or Conduits; and
 - (5) A copy of the Pole Owner's response to the written request including all information given by the Pole Owner to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a Pole Owner's written response, or if the Pole Owner denies the complainant any other information reasonably needed to establish its prima facie case.
- (f) The source of data and information required under this Section shall be identified. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.
- (g) The complaint shall include a brief summary of all steps taken to informally resolve the problem prior to filing.
- (h) If any of the information filed or provided under this Rule is data that is publically unavailable and which was provided pursuant to Rule 5.02(c):
- (1) The complainant shall not file or otherwise include such data with the complaint, but the complaint shall generically describe the data.
 - (2) The complainant shall include a notice to the respondent that the complainant intends to use the data in the complaint proceeding.
 - (3) If the respondent desires to protect the data from public disclosure, the respondent shall have 20 days from the date of service of the complaint to file a motion for protective order pursuant to the Commission's Rules of Practice and Procedure.
 - (4) If the respondent has not filed a motion for protective order within 20 days from the date of service of the complaint, the complainant shall file the data as a supplement to its complaint.

Rule 5.04 **Response and Reply**

- (a) The complaint shall be served on respondent pursuant to Rule 9.02 of the Commission's *Rules of Practice and Procedure*.
- (b) Respondent may file a response pursuant to Rule 9.02 of the Commission's *Rules of Practice and Procedure*.
- (c) Thereafter, the Commission may adopt a procedural schedule for the filing of written testimony with or without a hearing, as appropriate.

**Pole Attachment Rate Formula
And
Conduit Rate Formula**

Appendix A

**Pole Attachment Rate Formula
Local Exchange Carrier Pole Owners
FCC Part 32 Accounts**

$$\text{Maximum Per Pole Rate} = \text{Space Factor} \times \text{Net Cost of A Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Space Factor} = \frac{\text{Occupied Space} + \left[\frac{2}{3} \times \left(\frac{\text{Unusable Space}}{\text{No. of Attachers (including the Public Utility pole owner)}} \right) \right]}{\text{Pole Height}}$$

$$\text{Net Cost of A Bare Pole} = \frac{\text{Net Pole Investment} \times 95\%}{\text{Total Number of Poles}}$$

$$\text{Net Pole Investment} = \text{Gross Pole Investment (Account 2411)} - \text{Accumulated Depreciation (Account 3100)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Poles)}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant) (Accounts 4100+4340)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 6411 - Rental Expense (Poles)}}{\text{Net Pole Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 2411)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\text{Gross Plant Investment (Account 2001)} - \text{Accumulated Depreciation (Account 3100)} - \text{Accumulated Deferred Taxes (Plant)(Accounts 4100+4340)}}$$

$$\text{Return Element} = 8.00\%$$

**Pole Attachment Rate Formula
Electric Utility Pole Owners
FERC Part 101 Accounts**

$$\text{Maximum Per Pole Rate} = \text{Space Factor} \times \text{Net Cost of A Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Space Factor} = \frac{\text{Occupied Space} + \left[\frac{2}{3} \times \left(\frac{\text{Unusable Space}}{\text{No. of Attachers (including the Public Utility pole owner)}} \right) \right]}{\text{Pole Height}}$$

$$\text{Net Cost of A Bare Pole} = \frac{\text{Net Pole Investment} \times 85\%}{\text{Total Number of Poles}}$$

$$\text{Net Pole Investment} = \frac{\text{Gross Pole Investment (Account 364)} - \text{Accumulated Depreciation (Account 108)(Poles)} - \text{Accumulated Deferred Income Taxes (Account 190, 281 - 283)(Poles)}}{1}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (per FERC Form 1)}}{\text{Gross Plant Investment (per FERC Form 1) - Accumulated Depreciation (Account 108) - Accumulated Deferred Taxes (Plant) (Account 190, 281 - 283)}}$$

$$\text{Maintenance Element} = \frac{\text{Account 593}}{\text{Pole Investment in Accts. 364,365 \& 369} - \text{Depreciation (Poles) Related to Accts. 364,365 \& 369} - \text{Accumulated Deferred Inc. Taxes Related to Accts. 364,365 \& 369}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Pole Investment (Account 364)}}{\text{Net Pole Investment}} \times \text{Depreciation Rate for Gross Pole Investment}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1, + 409.1 + 410.1 + 411.4 - 411.1}}{\text{Gross Plant Investment (per FERC Form 1) - Accumulated Depreciation (Account 108) - Accumulated Deferred Taxes (Plant)(Account 190, 281-283)}}$$

$$\text{Return Element} = 8.00\%$$

**Conduit Rate Formula
Local Exchange Carrier Conduit Owners
FCC Part 32 Accounts**

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Percentage of Conduit Capacity Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{Net Linear Cost of Conduit}} \times \text{Carrying Charge Rate}$$

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Percentage of Conduit Capacity Occupied}} = \frac{1 \text{ Duct}}{\text{Number of Inner Ducts}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{Net Linear Cost of Conduit}} = \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Gross Conduit Investment (Account 2441)}} - \frac{\text{Accumulated Depreciation (Account 3100)(Conduit)}}{\text{Accumulated Depreciation (Account 3100)(Conduit)}} - \frac{\text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Conduit)}}{\text{Accumulated Deferred Income Taxes (Account 4100 + 4340)(Conduit)}}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (Accounts 6710 \& 6720)}}{\frac{\text{Gross Plant Investment - Accumulated Depreciation - Accumulated Deferred Taxes (Plant)}}{(\text{Account 2001}) \quad (\text{Account 3100}) \quad (\text{Accounts 4100+4340})}}$$

$$\text{Maintenance Element} = \frac{\text{Conduit Maintenance Expense (Account 6441)}}{\text{Net Conduit Investment}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 2441)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Operating Taxes (Account 7200)}}{\frac{\text{Gross Plant Investment - Accumulated Depreciation - Accumulated Deferred Taxes}}{(\text{Account 2001}) \quad (\text{Account 3100}) \quad (\text{Plant})(\text{Accounts 4100+4340})}}$$

$$\text{Return Element} = 8.00\%$$

**Conduit Rate Formula
Electric Utility Conduit Owners
FERC Part 101 Accounts**

$$\text{Maximum Rate} = \frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Capacity Occupied}} \times \frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} \times \text{Carrying Charge Rate}$$

$$\frac{\text{Percentage of Conduit Capacity Occupied}}{\text{Capacity Occupied}} = \frac{1 \text{ Duct}}{\text{Number of Inner Ducts}}$$

$$\frac{\text{Net Linear Cost of Conduit}}{\text{of Conduit}} = \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}$$

$$\text{Net Conduit Investment} = \frac{\text{Gross Conduit Investment (Account 366)} - \text{Accumulated Depreciation (Account 108)(Conduit)} - \text{Accumulated Deferred Income Taxes (Conduit) (Account 190, 281 - 283)}}{\text{Conduit}}$$

$$\text{Carrying Charge Rate} = \text{Administrative} + \text{Maintenance} + \text{Depreciation} + \text{Taxes} + \text{Return}$$

$$\text{Administrative Element} = \frac{\text{Total General and Administrative (per FERC Form 1)}}{\frac{\text{Gross Plant Investment (per FERC Form 1)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant) (Account 190, 281 - 283)}}{\text{Plant}}}$$

$$\text{Maintenance Element} = \frac{\text{Account 594}}{\frac{\text{Conduit Investment in Accts. 366,367 \& 369} - \text{Depreciation (Conduit) in Accts. 366,367 \& 369} - \text{Accumulated Deferred Inc. Taxes Related to Accts. 366,367 \& 369}}{\text{Conduit}}}$$

$$\text{Depreciation Element} = \frac{\text{Gross Conduit Investment (Account 366)}}{\text{Net Conduit Investment}} \times \text{Depreciation Rate for Conduit}$$

$$\text{Taxes Element} = \frac{\text{Accounts 408.1, + 409.1 + 410.1 + 411.4 - 411.1}}{\frac{\text{Gross Plant Investment (per FERC Form 1)} - \text{Accumulated Depreciation (Account 108)} - \text{Accumulated Deferred Taxes (Plant)(Account 190, 281-283)}}{\text{Plant}}}$$

$$\text{Return Element} = 8.00\%$$