ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF A RULEMAKING PROCEEDING TO CONSIDER CHANGES TO THE ARKANSAS PUBLIC SERVICE COMMISSION'S POLE ATTACHMENT RULES	))))	**DOCKET NO. 15-019-R ORDER NO. 7**

ORDER

Procedural History

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. On June 24, 2016, Order No. 5 adopted modified PARs. An Application for Rehearing was filed on July 22, 2016, by 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, LLC, CenturyTel of Northwest Louisiana, Inc., CenturyTel of Redfield, Inc., CenturyTel of South Arkansas, Inc., E. Ritter Communications, Inc., Rice Belt Telephone Company, Inc., South Arkansas Telephone Company, Southwestern Bell Telephone Company, d/b/a AT&T Arkansas, Windstream Arkansas, LLC, and Yelcot Telephone Company (collectively, the TelCos) and by the Arkansas Cable Telecommunications Association (ACTA). On August 1, 2016, Responses to the Applications for Rehearing were filed by the General Staff of the Commission (Staff); Ozarks Electric Cooperative Corporation (Ozarks); and Arkansas Electric Cooperative Corporation (AECC) and its Member

Cooperatives[1]. On August 9, 2016, ACTA filed a Reply to the Responses. On August 19, 2016, Order No. 6 granted rehearing solely for the purpose of further consideration of those filings.[2]

Petitions for Rehearing

The TelCos and ACTA raise issues in the following areas in their Applications: (1) a request to introduce additional evidence; (2) operational issues on overlashing, reservation of space, and inspections and audits; (3) rate issues concerning the primary pole purpose, effective ratemaking and the presumed number of attachers, and safety space; (4) compliance with Ark. Code Ann. §§ 23-4-1003(b)(2) and 23-17-411(c); and (5) the Financial Impact Statement.

1. Request to Introduce Additional Evidence

The TelCos and ACTA seek permission to use in rehearing the evidence contained in two requests for administrative notice filed by the Joint Commenters[3] on December 1, 2015, and April 27, 2016. The December 1 request concerned an order by the Federal Communications Commission in GN Docket No. 09-51 issued after the date of the hearing (FCC Order). The April 27 request concerned an announcement by Ozarks

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[1] 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).

[2] Order No. 6 also struck the Supplemental Testimony of Randy Klindt, Todd Townsend, and Mitchell Johnson (with one exhibit) filed by Ozarks on August 1, 2016, and the exhibit to ACTA's Reply filed August 9, 2016, finding that the *Rules of Practice and Procedure* prohibit the filing of additional testimony and exhibits as a part of a petition for rehearing.

[3] The Joint Commenters include the TelCos and ACTA.

Electric Cooperative of the creation of OzarksGo LLC to offer all-fiber high-speed internet, television, and telephone services (Ozarks' Announcement). In Order No. 5, the Commission declined to take official notice of these items, citing to the fact that they were filed after the evidentiary record was closed.

The TelCos and ACTA both state that the FCC Order is relevant to this Docket because the FCC took additional steps to align its telecom rate with its cable rate for pole attachments. TelCos Application at 13; ACTA Application at 2. The TelCos and ACTA express concerns about the applicability of the PARs or the statutes to the attachments by OzarksGo and about whether certain potential actions by Ozarks or OzarksGo would result in anti-competitive, discriminatory treatment of other communications providers in violation of Ark. Code Ann. § 23-4-1002. The TelCos and ACTA question whether the 2007 Broadband Over Power Lines Enabling Act[4] applies to this situation and whether Ozarks could give its affiliate monetary or non-monetary terms and conditions for attachments more favorable than those offered to other attachers. The TelCos and ACTA also express concern that Ozarks will be able to subsidize OzarksGo with its ratepayers' money. TelCos Application at 13-15; ACTA Application at 3-4.

Ozarks responds to the points concerning the Ozarks' Announcement by opining that a fiber optic broadband cable installed for an electric cooperative's own uses and benefits is not a pole attachment and that the 2007 Broadband Over Power Lines Enabling Act applies; discussing the Commission's jurisdiction over such situations; maintaining that Ozarks will not subsidize OzarksGo; and detailing the need for high speed broadband services to rural and other areas. Ozarks Response at (unnumbered)

[4] Ark. Code Ann. §§ 23-18-801 *et seq.*

2-6. ACTA replied to Ozarks and disputed that the 2007 Broadband Over Power Lines Enabling Act applies and reiterated concerns about possible subsidization.

Staff does not support a rehearing based on either the FCC Order or Ozarks Announcement. Staff points out that the fact that the FCC completed its evaluation process does not warrant a rehearing and that since the Commission has already considered the information, the evidence is cumulative. Staff Response at 10-11. Concerning the Ozarks Announcement, Staff states that a concern about potential anti-competitive or discriminatory behavior is not grounds for rehearing. Staff points out that the TelCos and ACTA are concerned with the application of the PARs to a specific set of facts, which may or may not happen sometime in the future. Staff asserts that the PARS (as well as Ark. Code Ann. § 23-3-119) contemplate a mechanism for complaints but rulemaking is not the place to address specific complaints. *Id.* at 11-12.

The Commission finds that the proposed additional evidence is not relevant to this rulemaking and denies the TelCos' and ACTA's requests to introduce it in rehearing. As to the FCC Order, Order No. 5 did not adopt a rate formula based on an FCC formula, nor did it rely on any reasoning by the FCC which the FCC Order reversed or revised. Regardless, evidence of actions taken by other jurisdictions is merely persuasive and not binding on this Commission. Therefore, the FCC Order is not relevant to this rulemaking and the rehearing; the Commission declines to permit its introduction and denies rehearing.

The Ozarks' Announcement is likewise not relevant to this rule-making proceeding. Neither the TelCos nor ACTA suggest any rule change which could be made

to the PARs that would properly address the concerns that they have raised.[5] Arkansas Code Annotated § 23-4-1002 by its terms requires nondiscriminatory access for pole attachments. An alleged violation of the PARs or statute should be brought to the Commission in a complaint proceeding, as provided by Ark. Code Ann. § 23-4-1004. Questions about applicability of the statute and PARs to a specific pole attachment should likewise be raised in a complaint docket.[6] Any concerns about improper subsidization of OzarksGo by Ozarks could be addressed in a complaint or rate proceeding for Ozarks. Therefore, while the subject matter of the concerns may be relevant to unrelated matters such as affiliate transactions, ratemaking, or a complaint proceeding, the concerns expressed by the TelCos and ACTA about the Ozarks Announcement are not relevant to this rulemaking; the Commission declines to permit its introduction and denies rehearing.

2. Operational Issues

A. Overlashing

The TelCos request that the Commission rehear and reconsider its Rules to: (1) decide whether overlashings involving fiber optic cable should be subject to the permitting process as contemplated in the Rules; and (2) ensure Ozarks, and all other Pole Owners, are prohibited from using information obtained through overlashing, or any other activity associated with making attachments, for competitive purposes.

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[5] On a different topic, the TelCos suggest that PAR 2.02(d) should be amended to state that "A pole owner may not reserve space for an affiliate." TelCos Application at 4. As stated *infra*, the Commission declines to make this addition as the rule already states that "A Pole Owner may reserve available space on its facilities for future provision of its core utility service...." (Emphasis added).

[6] As evidenced by the Applications, the Responses by Ozarks and Staff, and ACTA's Reply, the application of the statutes to the Ozarks/OzarksGo situation is very specific and fact intensive and is not the proper subject of a rulemaking.

Application at 4. The TelCos assert that a permit for fiber optic overlashing is unnecessary and seek to prevent a pole owner from using sensitive information from pole attachments for competitive purposes.

AECC explains that overlashing raises important safety and reliability issues and responsible management of pole plant requires that overlashing be subject to the same approval process as other attachment requests. AECC Response at 3. AECC notes that the TelCos' arguments are the same raised at the hearing, with the exception of the TelCos' addition of the argument that the creation of OzarksGo also supports their position. *Id.* at 2. AECC further asserts that the TelCos argument is simply that they do not like the ruling in Order No. 5 but offer no further support. AECC states that the allegations concerning OzarksGo are not such that the rule on overlashing should be revised. *Id.* at 3. AECC explains that the TelCos are pole owners and receive the same information about which they raise concerns. *Id.* at 4.

Staff responds to the TelCos by detailing the specific justifications for overlashing upon which Order No. 5 relied and notes that the fact that the Order was not in the TelCos' favor is an insufficient basis for rehearing. Staff Response at 3.

The Commission finds that the TelCos have raised no new issues which support a revision to Rule 2.01 on overlashing. The evidence continues to support the need for a permit for overlashing because of safety and reliability concerns. The existence of OzarksGo or any complaint about OzarksGo's pole attachments do not support any revision to the rule on overlashing and are not properly the subject of this rulemaking, as stated *supra*. The TelCos fail to explain why information given to the pole owner on overlashing, as opposed to other information, is so competitively sensitive that the rules

must be revised to address it. The Commission notes that this issue was not raised at the hearing despite the fact that there is a potential for competition among pole attachers even without considering OzarksGo. The pole attachment statutes do not address the exchange of competitive information and the parties are certainly free to negotiate terms governing this information in their agreements. If any party to an agreement believes that another party has violated an agreement, the statutes, or the PARs in relation to competitive information, the statute provides for a remedy through a complaint process. Therefore, the Commission declines to adopt any revision to Rule 2.01.

B. Reservation of Space

The TelCos ask that the Commission reconsider its determination on Rules 2.02(d) and (e) regarding reservation of space. The TelCos allege that the formation of OzarksGo requires an amendment to Rule 2.02(d) to "ensure pole owners provide non-discriminatory access to all attachers." Application at 4. The TelCos further state that the allocation of the entire cost of accommodating a pole owner's use of the reserved space to the attaching entity is contrary to the fundamental principle that costs should be borne by the cost causer. They point out that the pole owner is the cost causer in these instances and that the benefits of the expanded capacity flow solely to the pole owner and its customers. The TelCos suggest a deletion of the last phrase in Rule 2.02(e). *Id.* at 5.

AECC responds to the TelCos by noting that revisions are unnecessary because Rule 2.02(d) already provides that a pole owner may reserve space only for the future provision of its core utility service, which does not include any commercial

telecommunications service that may be provided by an affiliate. AECC Response at 4. AECC says that the TelCos raise for the first time on rehearing the argument that it would be unfair to allocate capacity expansion costs solely to the attaching entity. AECC asserts that the TelCos' proposal fails to properly allocate costs to the cost causer. AECC notes that the proposed rule change also accepts that the attacher's use of reserved space is temporary and that the attacher may be required to remove its attachment when the pole owner needs the reserved space. AECC states that when a new pole is needed because of a new attachment, the attaching entity is the cost causer. AECC Response at 4-5.

Staff submits that the Commission's findings on reservation of space are supported by substantial evidence and notes that the Commission rejected AECC's proposal to presume a reservation of space when an agreement is silent. Staff notes that the TelCos' argument on the cost of accommodating was not raised at the hearing. Finally, Staff points out that the OzarksGo development is not relevant for the purposes of this docket and an insufficient basis to grant a rehearing. Staff Response at 3-4.

Concerning Rule 2.02(d), the Commission agrees with AECC that the rule does not need to be revised as it already states that a pole owner may reserve space only for the future provision of its core utility service.

Concerning Rule 2.02(e), it is consistent with the principles of cost causation to assign the interim attaching entity the costs of expanding capacity. An attaching entity attaches to reserved space knowing that it may be required to remove or move its attachments when the space is needed by the pole owner. Using the TelCos' example of

a taller pole, but for the attachment, the taller pole would not be needed. Therefore, the Commission declines to adopt the TelCos' proposed changes to Rules 2.02(d) and (e).

C. Inspections and Audits

The TelCos request that the Commission rehear the mandate for inspections and audits every five years and the cost allocation for these inspections and audits. The TelCos allege that there is no evidence to support a five year cycle and that attachers are assigned an inordinate share of the costs; they suggest that attachers should bear no more than fifty percent of such costs. Application at 5.

AECC points out that it introduced evidence of safety violations and that the Joint Commenters also provided the same. AECC Response at 5-6. AECC also states that the TelCos previously proposed the same fifty-fifty split while AECC proposed that 100% of the costs be assigned to attachers because the only reason these audits and inspections need to be conducted is because there are attaching entities on the poles; AECC observes that SWEPCO made the same proposal. *Id.* at 6. AECC notes that the Commission's decision essentially split the difference between the two positions and that the TelCos raise no new arguments not already addressed by the Commission. *Id.* at 6.

Staff states that the TelCos have not raised any new evidence to support a rehearing. Staff further states that the audit and inspection schedules, like all the PARs, are not a mandate as suggested by the TelCos but only apply when the parties cannot agree to a different schedule. Staff notes that evidence supports the cost assignment adopted by the Order as the Commission found that some sharing of the costs is justified. Staff Response at 4-6.

The Commission finds that the TelCos have introduced no new evidence to support a rehearing on the audit and inspection schedules or assignment of costs. As noted by both Staff and AECC, the PARs apply only when the parties cannot voluntarily agree; the parties are free to negotiate another schedule or allocation of costs in their agreement. Further, as noted by AECC, the audits and inspections would not need to occur but for the attachment, so it is reasonable to share those costs. The sharing as well as the timing presents a balanced approach, considering the proposals of the parties. The Commission therefore declines to revise Rule 3.02(b) and (d) or Rule 3.03(b) and (d).

3. Rate Issues

A. Primary Pole Purpose

The TelCos and ACTA maintain that the statements in Order No. 5 that "the primary purpose of the pole is to provide utility services" and "Staff's rates are formulated in recognition [of this]" are discriminatory and unlawful. They argue that Act 740 of 2007 did not state that the primary purpose of the pole is to provide utility services but instead stated all pole attachments are treated equally. They say that Staff's proposed rate adopted by the Commission significantly favors the utility pole owner and that the TelCos and ACTA provided substantial evidence demonstrating the bias of the Staff formula to utility pole owners. They allege that the Order is unreasonable, unjust, arbitrary, and capricious. TelCos Application at 6-7; ACTA Application at 5-6.

AECC responds that the formula adopted actually favors the attaching entities; AECC's proposed formula allocated more costs to the attaching entities, while Staff's formula as adopted allocated considerably fewer costs to the attaching entities, thus

lowering the pole attachment rate considerably. AECC Response at 7. AECC maintains that this decision evidences no bias in favor of pole owners but in fact the opposite. AECC notes that the TelCos' and ACTA's argument discounts the private ownership of utility facilities and suggests that utility facilities are akin to publicly-owned facilities, and that view promotes an additional subsidy in favor of for-profit attaching entities at the expense of the Member Cooperatives' retail ratepaying members. AECC further notes that evidence offered by the Joint Commenters that they do not have the same rights as pole owners to the poles supports the finding that the primary purpose of the pole is to provide utility service. *Id.* at 8-9.

Staff points out that although the TelCos and ACTA provided evidence supporting their rate formula, Staff likewise supported its rate formula and the conclusion that the primary purpose of utility-owned poles is to provide utility service. In relying on Staff's evidence and this conclusion, Staff observes that, as a rebuttable presumption, the Commission appropriately assigned the majority (70%) of the costs of the pole to the pole owner and appropriately allocated costs between the pole owner and the attaching entities based on their use of the pole. Staff notes again that the parties are free to negotiate other terms, including rates, and that the rule will not even apply unless the parties are unable to do so and seek Commission intervention. Staff Response at 6-7.

While it is true that a public utility must provide nondiscriminatory access for a pole attachments to all the entities listed in Ark. Code Ann. § 23-4-1002, it is also true that by definition, a "pole attachment" is to a pole, duct, or conduit "owned or controlled by a public utility." Ark. Code Ann. § 23-4-1001(1)(A). A "public utility" means an electric utility, electric cooperative, or telecommunications provider under Ark. Code

Ann. § 23-4-1001(2)(A). Therefore, the statement that the primary purpose of the pole is to provide utility service is consistent with this definition because the pole, duct, or conduit was placed to provide utility service by the public utility, whether or not there are third party attachments.

The Commission noted in Order No. 5 that several competing rate formulae were offered by the parties which produce different rates and thus affect pole owners and attachers differently. The TelCos and ACTA have stated no reason to revise the Commission's findings that the primary purpose of the pole is to provide utility service and that 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.

B. Effective Ratemaking and Presumed Number of Attachers

The TelCos and ACTA allege that adoption of Staff's rate formula is unlawful and in violation of Ark. Code Ann. § 23-4-1003(b)(1) because it does not provide effective regulation of the rates under which a public utility shall provide access for pole attachments. ACTA observes that the number of attachers is a "key component" of the formula proposed by Staff and adopted by the Commission. Both state that this will lead to disputes because the " 'number of attachers' input point" is exclusively controlled by the pole owners and cannot readily be independently verified by the attacher or the Commission. They conclude that this adds a level of complexity and arbitrariness to the formula. Further, they say that the presumption of three attachers will cause the pole owners to claim a system-wide average of less than three and lead to disputes; with an "artificially low system-wide average number of attaching entities," an attacher will be incented to dispute the number of attachers. This is in contrast to the approach taken

by the FCC.[7] Concluding, the TelCos and ACTA opine that adopting a formula that will encourage more disputes is not effective regulation. TelCos Application at 7, 9; ACTA Application at 6-8. ACTA adds that the proposed cable formula is a more effective ratemaking mechanism because its application does not depend on knowing the number of attaching entities, thus leading to fewer disputes and uniform applicability. ACTA Application at 8.

AECC remarks that the TelCos' and ACTA's argument on the number of attaching entities is the same as that raised previously which has already been considered and rejected, thus offering no basis for reconsideration. AECC Response at 11.

Staff notes that the Commission specifically addressed the rate formula in Order No. 5. Staff points out again that the presumed number of attachers in the formula is not a mandated number either in negotiations or in a complaint before the Commission and that the Order specifically recognized that the assumption may be overcome by the specific facts of a case. Staff concludes that the formula adopted does not encourage more disputes and is an effective regulation. Staff Response at 8-9.

As the Commission noted in Order No. 5, the rate formula was adopted to ensure that each attaching entity pays a reasonable portion of the revenue requirement associated with the poles. The adopted formula does this, in part, by considering the number of attachers and thus recognizes that it is reasonable for the rate to change depending on the number of attachers. The fact that the parties may dispute that number, if they ever come before the Commission to resolve a complaint, is not a reason in and of itself to reject the formula. And while ACTA avers that its proposed formula

[7] Both reference the FCC ruling which was the subject of the December 1, 2015, request to take administrative notice and which is discussed *supra*.

produces just and reasonable rates, it never alleges that the adopted formula does not. The issues noted by ACTA and the TelCos in their Applications were addressed by Order No. 5. The Commission therefore declines to revise the rate formula adopted in Order No. 5.

C. Safety Space

ACTA and the TelCos assert that the Commission's decision to include the safety space in the definition of unusable space is not supported by substantial evidence. They opine that the overwhelming evidence is that safety space is used by electric utilities and note that the FCC and nearly all public utility commissions that regulate pole rates define the safety space as part of the usable space because this space is routinely used by electric utilities for a number of purposes. The result of the decision is to allocate a greater percentage of total pole costs to attachers. ACTA Application at 8-9; TelCos Application at 7-8. ACTA asserts that such action is unreasonable, unjust, arbitrary, and capricious. ACTA Application at 10.

AECC notes that its position at the hearing was that the National Electric Safety Code calls the safety space the "communication worker safety zone" in recognition of its role to protect communications workers and that the costs associated with this space should be allocated evenly among attaching entities and the pole owner. AECC counters ACTA and the TelCos by pointing out that several other states allocate even more of the costs associated with the safety space to attachers. AECC states that the safety space exists only for the protection of communications workers and so costs associated with the safety space should be allocated solely to communications attachers. AECC Response at 9-10.

Staff observes that the TelCos and ACTA present the same arguments previously made, which arguments were reviewed and rejected by the Commission. Staff states that as no other information has been provided and as the Order relies on evidence supported by Staff, the TelCos' and ACTA's assertions that the Commission's findings are not based on substantial evidence is incorrect. Staff Response at 8.

ACTA and the TelCos raise no new issues. The rule on safety space appropriately balances the interest of the parties and properly allocates costs. Because the Commission considered and rejected ACTA's and the TelCos' arguments in Order No. 5, there is no cause for rehearing on this issue.

4. Compliance with Ark. Code Ann. §§ 23-4-1003(b)(2) and 23-17-411(c)

The TelCos allege that Order No. 5 does not consider Ark. Code Ann. § 23-4-1003 as it fails to evaluate the impact of the PARs on consumers of all services provided through pole attachments. Application at 11. The TelCos state that the PARs represent a "drastic shift" from current joint use practice and will have "significant adverse impacts on the subscribers of telephone companies and cable providers." *Id.* at 11. The TelCos state that no party has addressed these interests nor provided any evidence on the impact and further state that the Commission would need to know "the probable rates and increased operating expenses telephone companies and CATV providers will likely experience as a result of implementing the PARs." *Id.* at 12.

Staff as well as AECC and its Member Cooperatives address the TelCos arguments. Staff and AECC both point out that the TelCos misstate the requirements of Ark. Code Ann. § 23-4-1003(b)(2), which states:

> In developing and implementing the rules under this subsection, the commission shall consider:

(A) The interests of the subscribers of the services offered through pole attachments;
(B) The interests of the consumers of the public utility services;
(C) Maintenance of reliability of public utility services; and
(D) Compliance with applicable safety standards.

Staff Response at 13-14. AECC details how the Joint Commenters provided extensive analysis of the possible effect of the PARs on broadband services, so that the interests of subscribers of attaching entities has been thoroughly analyzed. AECC Response at 14. Staff points out that Order No. 5 considered "subscribers of the services" and "consumers of the public utility services" as part of the over-arching public interest determination. Staff Response at 14. AECC also notes that the statute does not require a determination of the probable rates and increased operating expenses and that such an undertaking would be onerous with a great deal of speculation, for which the TelCos provided no support. AECC Response at 15.

The Commission agrees with Staff and AECC that Order No. 5 considered the appropriate factors under Ark. Code Ann. § 23-4-1003. As this Commission said repeatedly and as specifically provided in the statutes and PARs, the PARs only apply in the absence of a voluntarily negotiated agreement, so any "shift" or impact is speculative. Order No. 5 recites the plethora of evidence by the parties on these factors and makes appropriate findings on the issues raised by the parties. The Commission finds that the PARs are in the public interest and affirms that they comply with the relevant statutes, including Ark. Code Ann. § 23-4-1003. Specifically, the Commission affirms that Order No. 5 considered the interests of the subscribers of the services offered through pole attachments, the interests of the consumers of the public utility

services, maintenance of reliability of public utility service, and compliance with applicable safety standards.

The TelCos further assert that the Commission did not conduct a cost benefit analysis for telecommunications providers in compliance with Ark. Code Ann. § 23-17-411(c). They state that the statute requires the Commission to identify and quantify the benefits and costs of compliance of the adoption and implementation of each and every one of the PARs. Application at 10-11. They ask that telecommunications service providers be exempt from the PARs unless and until the required cost benefit showing is made. *Id.* at 11.

Staff points out that the cost benefit analysis is required only when the new rule or regulation increases regulatory burdens on telecommunications service providers, and that this is not the case in this instance. Staff states that the TelCos and ACTA have neither addressed nor provided evidence that the PARs increase regulatory burdens on telecommunications service providers. Staff Response at 15.

AECC points out that although the TelCos make this argument for the first time in this Docket in the TelCos application for rehearing, this is not a new issue. AECC Response at 11. *See also*, Staff Response at 15-16. Both AECC and Staff point to Docket No. 08-073-R which adopted the PARs. AECC states that in the absence of any action by the General Assembly to alter or otherwise address the Commission's interpretation in its previous order in intervening sessions of the General Assembly, the reasoning of the Commission is the adopted intent of the General Assembly and reflects the appropriate interpretation of the two statutes. AECC Response at 12-13.

Order No. 5 (at 21-22) in Docket No. 08-073-R considered and rejected the same argument by AT&T. The Order noted that Ark. Code Ann. § 23-4-1003 (Act 740 of 2007) provides that the Commission "shall" regulate the rates terms and conditions and "shall" develop rules for pole attachments and that this later, specific, free-standing grant of regulatory authority of the pole attachment statutes must prevail over the general provisions of Ark. Code Ann. § 23-17-411(c) (Act 77 of 1997). The Order concluded:

> Under the rules of statutory construction, the mandate of Act 740 of 2007 takes precedent over the provision of Act 77 of [1997] referred to by AT&T. Additionally the evidence clearly reveals that no additional burdens will be placed on AT&T, AT&T will be relieved of the burden of compliance with FCC pole attachments rules and regulations and there is simply no evidence that any additional burdens would be placed on AT&T. The worse case scenario for AT&T would be for a party to challenge AT&T's rates for pole attachments as being too high or for AT&T to have its pole attachment rates increased when it attaches to another company's pole. Again, as noted by Staff, "the rate impact associated with resolving a complaint is not a cost of compliance associated with the establishment of the PARS." Staff Brief at p. 10. "[A] rate set in a future complaint proceeding that is statutorily just and reasonable by definition does not represent a regulatory burden nor it is a cost of compliance with Rules and should not be considered in a quantitative cost benefit analysis with establishment of the Rules." (*Id.* p. 11).

The Commission affirms this finding.

The Commission agrees with Staff that the TelCos have not provided substantial evidence that the PARs increase regulatory burdens on telecommunications service providers. As previously stated, the PARs and the statutes encourage voluntarily negotiated agreements, with the PARs applying only in the absence of such agreements. With such agreements, the PARs impose no burdens since they do not apply. In fact, instead of increasing regulatory burdens, the PARs should decrease regulatory burdens since the PARs now give more specificity in a starting point for setting the rates, terms,

and conditions when a complaint is filed in the absence of a voluntarily negotiated agreement. The Commission therefore denies rehearing on this point.

5. Financial Impact Statement

ACTA alleges that the Financial Impact Statement (FIS) submitted by the Staff to the Governor's Office and filed on October 19, 2015, is inaccurate and that the record should be reopened to receive evidence of the impact of the rate formula and other PARs so that a more accurate FIS can be sent to the Governor's Office.

First, the FIS was not introduced into the record at the hearing and thus is not a part of the evidentiary record upon which Order No. 5 was based, as recognized by ACTA in its Application (at 10). A request for rehearing must be by a party aggrieved by an order issued by the Commission. Ark. Code Ann. § 23-2-422. There is nothing in Order No. 5 to rehear which deals with the FIS.

Second, to the extent it was relevant in the rulemaking, any party had the opportunity to present evidence during the course of the procedural schedule that calculated a rate based on the PAR formula, with specific inputs and assumptions on rulings, and provide a comparison to current contract rate(s). ACTA does not demonstrate good cause for failing to do so and thus fails to comply with Rule 4.14 of the *Rules of Practice and Procedure*.

Third, there is nothing to indicate that the FIS is inaccurate. As stated in the PARs, the rules only apply in the absence of a voluntarily negotiated agreement. The PARs do not require a company to do anything unless it wants the Commission to resolve a dispute regarding access to poles. As recognized in Docket No. 08-073-R, Order No. 5 at 21 (quoting Staff's Post-Hearing Brief):

> . . . [T]he Rules do not establish any new compliance costs. No new regulatory fees, assessments or filing requirements are imposed the Rules. The Rules do not require the companies to do anything unless they want the Commission to resolve a dispute regarding access, a dispute in negotiating a new agreement or a dispute over the implementation of an existing agreement.

In the years since the passage of the statutes on pole attachments and the original adoption of the PARs, all companies have functioned under voluntarily negotiated agreements, and nothing suggests that this will not be the case in the future. Even if a voluntary agreement cannot be negotiated, the PARs set a rate formula as a starting point and the resulting rate would depend on the evidence presented in a particular case; the rate could be the same, or lower, or higher than an attacher's current rate. Assuming any particular difference would be speculative.

The Commission therefore denies ACTA's request to reopen the record to receive information on the FIS.

Commission Ruling and Order

Accordingly, the Commission denies the Applications for Rehearing filed by the TelCos and ACTA for the reasons stated herein.

BY ORDER OF THE COMMISSION.

This 12th day of October, 2016.

Ted J. Thomas, Chairman

Elana C. Wills, Commissioner

Lamar B. Davis, Commissioner

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.

Cynthia Mayfield (acting)
Michael Sappington, Secretary of the Commission