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November 1, 2011

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The Honorable Terry G. Kilgore
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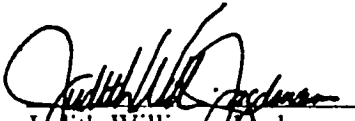
The Honorable Richard L. Saslaw
Member, Senate of Virginia
Chairman, Senate Committee on Commerce and Labor

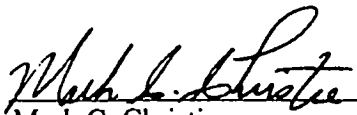
Gentlemen:

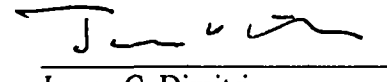
In accordance with your request of January 31, 2011, please find enclosed a report addressing the pole attachment issues and questions you posed. This report is the result of the joint efforts of our Energy and Communications Divisions with the input of numerous industry-related personnel who participated in the Commission's docket on this matter, specifically Case No. PUE-2011-00033, *Commonwealth of Virginia ex rel. State Corporation Commission, Ex Parte: In the matter of determining appropriate regulation of pole attachments and cost sharing in Virginia.*

We trust this report responds to your request. As always, we are available to provide additional information or assistance upon request.

Respectfully submitted,


Judith Williams Jagdmann
Chairman


Mark C. Christie
Commissioner


James C. Dimitri
Commissioner

Commonwealth of Virginia
State Corporation Commission

**Report to the House Commerce and Labor Committee
and the Senate Commerce and Labor Committee
of the Virginia General Assembly**



Report on Electric Cooperative
Pole Attachment Issues

November 1, 2011

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EXECUTIVE SUMMARY

Currently, the State Corporation Commission's ("Commission") authority over pole attachment rates, terms, and conditions is limited. Under § 56-41.1 of the Code of Virginia ("Va. Code"), the Commission has the authority to set just and reasonable rates for the connections by telephone cooperatives, mutual telephone associations and small investor-owned telephone utilities to the poles owned by electric utilities.¹ While Va. Code § 56-466.1 requires public utilities to negotiate in good faith with telecommunications service providers and cable television systems, it does not give the Commission any enforcement power when such negotiations fail. Rates for attachment to facilities owned by investor-owned electric utilities ("IOUs), meanwhile, are subject to federal regulation.² Where the parties cannot agree on a pole attachment rate, the Federal Communications Commission ("FCC") will apply one of two cost formulae, either the cable rate³ or the telecommunications carrier rate,⁴ to calculate the maximum permissible pole attachment rate in a given situation.

Should the General Assembly seek to "reverse preempt"⁵ the FCC by granting the Commission authority over all pole attachments, the legislation must allow a regulatory body to regulate all rates, terms, and conditions of pole attachments (such as by requiring utilities to

¹ The Commission does not have jurisdiction over wireless carriers.

² Because connection to poles owned by investor-owned electric utilities is subject to federal regulation, the Commission's authority under Va. Code § 56-41.1 is limited to connections by telephone cooperatives, mutual telephone associations, and small investor-owned telephone utilities to the poles owned by non-investor owned electric utilities, such as electric cooperatives.

³ The cable rate, which applies "to attachments to conduit by cable operators and telecommunications carriers," is set forth in 47 CFR § 1.1409(e)(3).

⁴ The telecommunications carrier rate, which applies "to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services," is the higher of the formulae set forth in 47 CFR § 1.1409(e)(2)(i) and (ii).

⁵ 47 U.S. Code § 224(c)(1) provides that the FCC does not have jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way for pole attachments in any case where such matters are regulated by a state. Provided that the state certifies to the FCC that it regulates the rates, terms and conditions of pole attachments and that the state regulation of such attachments fulfills the requirements of Section 224, then the state (and the appropriate regulatory agency within the state) has jurisdiction over attachments, not the FCC.

include such terms in their tariffs) and provide the Commission the authority to consider the interests of both the subscribers of the services offered via such attachments and the consumers of the utility services to whose poles the facilities are attached.

To date, the Commission has not established any formula or policy parameters to be used in establishing pole rental rates under Va. Code § 56-41.1.⁶

The methodologies for determining pole attachment rates can vary depending upon the ratemaking philosophy or public policy objective. These approaches range from an incremental approach that would base pole attachment rates only on the incremental costs necessary to allow the pole attachment, to an approach that would recover the fully allocated costs of poles. The FCC approach, which is not based on fully allocated cost, represents an approach that is intended to promote certain policy objectives and is considered by some to be unfair from an equitable sharing of common costs perspective. Others believe the FCC approach appropriately allocates cost when policy objectives are considered. In short, there is no clear consensus as to one optimal approach for establishing pole attachment rates. Therefore, the best approach for Virginia may be dependent on the desired public policy objective. For example, if the public policy is to pursue the broadest deployment of broadband without regard to arguments of cross-subsidization, then one would consider a methodology for pole attachment rates based solely on the recovery of incremental rates necessary to accommodate the attachments. If the public

⁶ The Commission was the forum for one case in 2003 in which several small investor-owned telephone companies and telephone cooperatives filed a petition pursuant to Va. Code §§ 56-41.1 and 56-466.1, requesting the Commission to impose certain rates and terms and conditions of service for their attachments to poles owned by several electric cooperatives. In that case, the Commission Staff recommended an approach similar to the FCC's telecommunications carrier formula rate, with several modifications. Specifically, the Staff proposal: (i) assumed a total of two attachments per pole instead of the FCC's presumption of three; (ii) used two feet for the attachment space instead of one foot as prescribed in the FCC formula; (iii) used the total distribution investment of the electric cooperatives instead of allocating only actual pole costs; and (iv) used the cost of capital of the electric cooperatives in the calculation of carrying cost instead of the return. The parties to this case later entered into a settlement, and the Commission dismissed the case without addressing the appropriate methodology for establishing pole attachment rates.

policy is to avoid any cross-subsidization, pole attachment rates would be based on the fully allocated investment and upkeep-related costs of poles. Of course, public policy could allow for the exercise of informed judgment by the Commission within designated parameters.

While it appears that inappropriate attachments can give rise to safety and electric systems reliability concerns and that unauthorized attachments can compound these concerns, there is some dispute as to the extent of these concerns and as to whether these concerns are caused by the pole owner or the attacher. The Commission believes that these concerns can be quite serious inasmuch as they can adversely impact reliability and pose significant safety concerns. Although these issues are currently being handled or self-policed by the pole owners and attachers, the electric utilities and cooperatives providing service in Virginia generally maintain that additional independent oversight is needed. The electric pole owners also believe that there should be significant penalties for inappropriate or unauthorized attachments. The Virginia Telecommunications Industry Association acknowledges the need for penalties for unauthorized or inappropriate attachments but indicates that penalties are only appropriate after notice and an opportunity for corrective action. This also implies the need for independent oversight.

The Commission believes that while there is some indication that additional oversight may be needed with respect to pole attachment-related safety and reliability issues, it is unclear how extensive such oversight should be. Effective independent oversight could range from a process based on complaints with independent arbitration to one with aggressive investigation and enforcement, which would entail the creation of a specific regulatory body or add to the responsibilities of an existing agency. In either event, an aggressive approach would require additional personnel, training, and development of regulations and could be expensive, placing a

significant new cost and burden on the responsible agency. In light of the potential cost of an aggressive enforcement approach and the uncertainties of the magnitude of pole attachment reliability and safety-related issues, the Commission believes that, should the General Assembly decide that additional independent oversight is needed, an appropriate first step would be to provide for a complaint-based approach with the potential for penalties after appropriate investigation and opportunity for hearing.

Ultimately, it is a public policy matter to determine the extent to which initiatives are necessary, if any, to ensure that broadband services are made available to all citizens and businesses in the Commonwealth, or which policies would achieve that goal effectively. No persuasive evidence was submitted in this proceeding that proved lower pole attachment rates would directly result in additional broadband deployment. To the extent that the level of rates for pole attachments may be seen as affecting that goal, the Virginia General Assembly may find it appropriate to provide the Commission or other regulatory body with the necessary statutory authority to establish such rates and oversight. Further, as electric cooperatives and investor-owned utilities are regulated under a “cost of service” model, any reduction to cooperatives’ and electric investor-owned utilities’ pole attachment rates will likely require an increase in consumers’ electric rates if the utilities’ revenue requirements remain the same. Such decisions are matters of public policy.

INTRODUCTION

During the 2011 Session of the Virginia General Assembly (“General Assembly”), the House of Delegates’ Commerce and Labor Committee (“House Committee”) considered HB 1439, which would have given the Commission jurisdiction, upon petition, over the rates, terms, and conditions of pole attachments by cable and telecommunications service providers on electric cooperative poles if negotiations between the parties failed to produce an agreement. HB 1439 would have required the Commission to utilize the principles established by the FCC in regulating pole attachments pursuant to 47 U.S.C. § 224 (“Section 224”) and would have provided that any rate established by the Commission would not exceed the highest rate for a similar attachment charged by an investor-owned electric utility providing service in areas adjacent to the service area served by the electric cooperative. Subsequently, the House Committee elected to defer consideration of HB 1439 pending completion of a Commission study of the legislation and related matters.

By letter dated January 31, 2011, Delegate Terry G. Kilgore and Senator Richard L. Saslaw requested that the Commission “prepare and issue a report to the House Committee on or before November 1, 2011, containing detailed standards and recommendations on electric cooperative pole attachment issues in the Commonwealth” (“January 31 Letter”).⁷ The letter requested that the Commission consider the need for rural broadband deployment in the Commonwealth as well as the economic development interest of government and the interests of various industry and customer segments. The letter also requested that the Commission include an analysis of the following issues in its report:

⁷ A copy of the January 31 Letter is attached as Appendix A.

1. An analysis of current electric cooperative pole attachment rates, including without limitation, the pole attachment rates charged by each electric cooperative, and aggregate pole attachment revenues for each electric cooperative.
2. Whether the incremental cost methodology and formula could be implemented in Virginia (see 47 USC § 224—as an example, not necessarily the formula).
3. Creation of a model pole attachment agreement and pole rate formula for suggested use by electric cooperatives and cable and telephone attachers to electric cooperative poles (who do not desire a joint use agreement) addressing issues such as unauthorized attachments, overlashing, pole replacements, and all non-annual rent issues, as well as an annual rent formula.
4. Creation of a suggested negotiating framework for parties in negotiating or disputing pole attachment agreement issues, before going to the Commission to resolve disputes.
5. Does the Commission interpret Va. Code § 56-41.1 to already provide it with jurisdiction to regulate electric cooperative pole attachments for “small investor-owned telephone utilities”?
6. Just and reasonable compensation for a proportionate share of the full costs of erecting, owning, operating and maintaining the entire pole and of the full costs of right of way maintenance.
7. Safety and electric system reliability issues, including, without limitation, compliance with the National Electric Safety Code, Virginia Department of Transportation road crossing clearance requirements and other relevant safety codes and requirements, technical specifications, guying requirements and electric service interruption.
8. What appropriate planning, operating policies, and procedures will be required of attachers?
9. Whether there is appropriate and effective Commission jurisdiction over all joint users of utility poles.

Finally, the letter asked that the Commission issue appropriate requests for information from pole attachers and utility pole owners and solicit the views of any other interested parties.

COMMISSION ORDER

On April 15, 2011, the Commission issued an Order Establishing Proceeding and Scheduling Hearing (“April 15 Order”).⁸ The Order required that notice be given to a broad range of interested parties and solicited comments on the following issues:

1. Is it appropriate for the Commission to use the FCC methodology for establishing electric utility and cooperative charges for pole attachments by telephone, cable television and broadband providers? What revisions, if any, to the FCC’s methodology are necessary to produce appropriate charges for pole attachments?
2. Are there other more appropriate methodologies for determining appropriate charges for pole attachments by telephone, cable television and broadband providers? What are the required elements of any such formulae?
3. What are the necessary elements or terms of a model pole attachment agreement including any necessary restrictions or conditions concerning overlashing, pole replacements, safety and reliability?
4. Is there a need for penalties for unauthorized or inappropriate pole attachments? If so, what are the appropriate bases for any such penalties?
5. What framework should be applied for parties negotiating pole attachment agreements?
6. How should disputes related to the development or administration of pole attachment agreements be resolved?
7. Does the Commission have the necessary authority to establish rates charged by electric utilities and cooperatives for pole attachments by telephone, cable television and broadband providers?
8. What constitutes just and reasonable compensation for pole attachments?

⁸ *Commonwealth of Virginia ex rel. State Corporation Commission, Ex Parte: In the matter of determining appropriate regulation of pole attachments and cost sharing in Virginia*, Case No. PUE-2011-00033, Doc. Con. Cen. No. 446493, Order Establishing Proceeding and Scheduling Hearing (Apr. 15, 2011). The April 15 Order is attached to the Report as Appendix B.

9. Is proportionate sharing of the full costs of erecting, owning, operating and maintaining the entire pole including right of way maintenance by all users of a pole appropriate?
10. Are there safety and electric system reliability issues associated with pole attachments by non-electric utility service providers, including, without limitation, compliance with the National Electric Safety Code, Virginia Department of Transportation road crossing clearance requirements and other relevant safety codes and requirements, technical specifications, guying requirements and electric service interruption?
11. Is there a need for the establishment of pole attachment related planning, installation, operating or maintenance procedures for non-utility service providers and, if so, what are the required procedures?
12. Is there appropriate and effective Commission jurisdiction over all joint users of utility poles?
13. Does: a) the need for rural broadband deployment in the Commonwealth; b) the economic interests of governments and businesses; c) the interests of existing and potential cable, telephone and broadband customers; d) the interests of utility customers and owners of poles; e) the safety of utility infrastructure and workers on utility poles; or, f) efficiency in use of public and utility rights of way require a particular methodology for establishing pole attachment rates and procedures?

In addition, the April 15 Order directed the utility pole owners to file the following information, where available, with the Commission's Division of Energy Regulation:⁹

1. The rates charged each non-electric service provider for pole attachments.
2. The basis used to determine any such rates.
3. Aggregate pole attachment revenues received during the last three calendar years.
4. An estimate of the contribution of aggregate pole attachment revenue to the electric utility's return on equity or cooperative's tier.

⁹ An amending order was issued on April 19, 2011.

5. An estimate of the contribution of pole attachment revenue to the electric cooperative's tier assuming that pole attachment charges were determined by use of the FCC methodology.
6. An estimate of the contribution of pole attachment revenue to the electric cooperative's tier, assuming that pole attachment charges were determined by a proportionate sharing of the full costs of erecting, owning, operating and maintaining the entire pole including rights of way maintenance, by all users of a pole.

Comments were received from Shentel Cable Company and Shenandoah Cable Telephone Company (jointly, "Shentel"); Virginia Electric Cooperatives ("Virginia Cooperatives");¹⁰ T-Mobile Northeast LLC d/b/a T-Mobile ("T-Mobile"); Northern Virginia Electric Cooperative ("NOVEC"); Virginia Cable Telecommunications Association ("VCTA"); CTIA-The Wireless Association ("CTIA"); NTELOS Telephone Company, Roanoke & Botetourt Telephone Company, NTELOS Network Inc., NA Communications Inc., R&B Network Inc, and FiberNet of Virginia, Inc. (collectively, "NTELOS"); the DAS Forum and Virginia Wireless Association (collectively, "VWA"); The Virginia Telecommunications Industry Association ("VTIA"); Windstream KDL-VA, Inc. ("Windstream"); Appalachian Power Company ("APCo"); Virginia Electric and Power Company ("Dominion"); and Kentucky Utilities Company d/b/a Old Dominion Power Company ("KU").¹¹

Additionally, Utility Pole Owners provided information to the Commission's Divisions of Energy Regulation and Communications regarding their pole attachment rates and revenues. Many of the pole owners maintained that this information should be treated as confidential.

¹⁰ A&N Electric Cooperative ("ANEC"), BARC Electric Cooperative ("BARC"), Central Virginia Electric Cooperative ("CVEC"), Community Electric Cooperative ("CEC"), Craig-Botetourt Electric Cooperative ("CBEC"), Mecklenburg Electric Cooperative ("MEC"), Northern Neck Electric Cooperative ("NNEC"), Powell Valley Electric Cooperative ("PVEC"), Prince George Electric Cooperative ("PGEC"), Rappahannock Electric Cooperative ("REC"), Shenandoah Valley Electric Cooperative ("SVEC"), Southside Electric Cooperative ("SEC"), and the Virginia, Maryland and Delaware Association of Electric Cooperatives.

¹¹ The individual comments can be viewed by visiting www.scc.virginia.gov/case/ and by performing a "docket search" for Case No. PUE-2011-00033.

The April 15 Order also scheduled a public hearing to provide interested parties an opportunity to provide additional comments regarding the issues in this proceeding. The hearing was held on July 13, 2011. The Virginia Cooperatives, Dominion, VCTA, APCo, NOVEC, KU, Verizon Virginia Inc. and Verizon South Inc. (collectively, "Verizon"), Central Telephone of Virginia and United Telephone Southeast LLC (collectively, "CenturyLink"), VTIA, and the Commission Staff ("Staff") participated in the hearing. During the hearing, the Commission sought specific comments on the legal basis of claims made by various participants that information submitted to the Commission's Division of Energy Regulation was confidential and whether the information deemed confidential should or should not be made part of the report to the General Assembly. After hearing argument on the treatment of information deemed confidential, the Commission ruled that data detailing only a range of applicable pole attachment rates for each pole owner will be included in this report. No entity requested reconsideration of this ruling.

LEGAL BACKGROUND

Under certain circumstances, the FCC has authority over the rental rates for pole attachments. This authority was first established by the Pole Attachment Act of 1978¹² which added Section 224 to the Communications Act of 1934.¹³ Section 224 directed the FCC to ensure that the rates, terms, and conditions for pole attachments by cable television systems were just and reasonable. This authority was subsequently modified by the Telecommunications Act

¹² Pub. L. No. 95-234, 92 Stat. 33 (1978).

¹³ Pub. L. No. 73-416, 48 Stat. 1064 (1934).

of 1996¹⁴ which, among other things, added “provider[s] of telecommunication service[s]” as a category of attacher entitled to pole attachments at just and reasonable rates.¹⁵

Section 224(b)(1) of Title 47 of the U.S. Code provides that

[s]ubject to the provisions of subsection (c) of this section, the [FCC] shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.

Section 224 defines “pole attachment” as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.”¹⁶ Section 224 further provides that the term “utility” does not include “any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.”¹⁷

Section 224(c) of Title 47 of the U.S. Code provides a right of reverse preemption to the states. That is, if a state certifies to the FCC that such state regulates pole attachment rates, terms and conditions, the FCC has no authority over pole attachments in that state. The FCC’s

¹⁴ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 252(f)).

¹⁵ The FCC’s rules governing pole attachments also have been modified several times. *See Local Competition Order*, CC Dockets 96-98 and 95-185, 11 FCC Rcd 15499 (1996) (*affirmed in large part, AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)); *Order on Reconsideration*, 14 FCC Rcd 18049 (1999) (*affirmed in part and denied in part, Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir., June 13, 2002)) (Case No. 99-15160); *Implementation of Section 703 of the Telecommunications Act of 1996; Amendments and Additions to the Commission’s Rules Governing Pole Attachments*, CS Docket 96-166, 11 FCC Rcd 9541 (1996); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendments of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) (implementing a separate rate calculation for telecommunications carriers); *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, 15 FCC Rcd 6453 (2000); *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98, 97-151, FCC 01-170 (May 25, 2001), *appeal pending, Am. Elec. Power Serv. Corp. v. FCC*, Case No. 01-1328 (D.C. Cir.); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order on Reconsideration, FCC 11-50 (Apr. 7, 2011).

¹⁶ 47 U.S.C. § 224(a)(4).

¹⁷ 47 U.S.C. § 224(a)(1).

authority over pole attachments is limited to those states, such as Virginia, that have not certified to the FCC that they regulate pole attachments.

Rates, terms, and conditions for utility pole attachments in states subject to FCC jurisdiction are established in the first instance by mutual agreement between the parties. If the parties are unable to reach agreement, any party may complain to the FCC. The FCC has established a formula for establishing maximum pole attachment rates for those utilities subject to its jurisdiction.¹⁸

Thus, under current law, providers seeking to attach to the poles of Virginia IOUs first must negotiate with the IOU. If a provider is unable to reach agreement with the IOU, the provider may file a complaint with the FCC, which will determine if the rate offered by the IOU is just and reasonable using the maximum rate formula as part of this evaluation. Certain comments filed in this matter suggest that the current regime has been working well and that complaints to the FCC are relatively uncommon.¹⁹

In contrast to its treatment of IOUs, Section 224 explicitly *excludes* cooperatives from FCC jurisdiction. Thus, the Commonwealth of Virginia does not need to preempt the FCC to regulate cooperative pole attachments since the FCC has no jurisdiction over such arrangements.²⁰

Currently, in certain circumstances, Virginia law contains some regulation of pole attachments for electric cooperatives. Va. Code § 56-41.1 encourages the joint use of poles

¹⁸ 47 C.F.R. § 1.1409(e)(3).

¹⁹ See, e.g., Comments of T-Mobile Northeast LLC at 2; Kentucky Utilities/Old Dominion Power Company Response to Questions for the Order Establishing Proceeding and Scheduling Hearing at Q-8.

²⁰ During the hearing on this matter, there was some discussion as to whether or not electric utility cooperatives are included with the current pole attachment provisions of the Va. Code. Compare Tr. at 380-81 (for the argument that Va. Code § 56-466.1 provides the Commission with jurisdiction over disputes with cable companies and electric cooperatives) with Tr. at 365-66 (for the argument that Va. Code § 56-466.1 does not provide the Commission with jurisdiction over electric cooperatives).

owned by telephone cooperatives, mutual telephone associations, and small investor-owned telephone utilities. Specifically, this statute provides:

A. [T]he joint use of poles by electric light, heat and power companies, telephone cooperatives, mutual telephone associations and small investor-owned telephone utilities is in the public interest and should be encouraged to the maximum extent possible.

B. The terms and rates for the joint use of poles by electric light, heat and power companies, telephone cooperatives, mutual telephone associations and small investor-owned telephone utilities shall be by agreement between the parties. In the event that the terms and rates cannot be agreed upon by the interested parties, it shall be the duty of the Commission to determine and establish such terms and the rates to be paid for joint use.

Va. Code § 56-466.1(B) requires:

Upon request by a telecommunications service provider or cable television system to a public utility, both the public utility and the telecommunications service provider or cable television system shall negotiate in good faith to arrive at a mutually agreeable contract for attachments to the public utility's poles by the telecommunications service provider or cable television system.

As defined in Va. Code § 56-466.1, a “public utility” includes cooperatives and excludes any pole attachments regulated pursuant to Section 224. Thus, cooperatives are required to negotiate pole attachment agreements in good faith, and once such contract is entered into, are required to

permit, upon reasonable terms and conditions and the payment of reasonable annual charges and the cost of any required rearrangement, the attachment of any wire, cable, facility or apparatus to its poles or pedestals, or the placement of any wire, cable, facility or apparatus in conduit or duct space owned or controlled by it, by such telecommunications service provider or cable television system that is authorized by law, to construct and maintain the attachment, provided that the attachment does not interfere, obstruct or delay the service and operation of the public utility or create a safety hazard.²¹

²¹ Va. Code § 56-466.1(C)

The Va. Code is silent on the appropriate recourse in the event a cooperative and either a cable television system or a telecommunications service provider are unable to reach agreement.

HB 1439, as introduced in the General Assembly's 2011 session, provided that:

[i]f a telecommunications service provider or cable television system and an electric cooperative cannot arrive at a mutually agreeable contract for pole attachments to an electric cooperative's facilities, upon petition for relief by the telecommunications service provider or cable television system, the Commission shall establish rates, terms, and conditions for such a contract, consistent with the goal of promoting access to electric cooperative facilities by telecommunications service providers and cable television systems in order to promote broadband connections and deployment throughout the Commonwealth. In establishing such rates, terms, and conditions, the Commission shall utilize the principles established by the Federal Communications Commission in regulations and case law for pole attachments regulated pursuant to 47 U.S.C. § 224, provided that any rate established by the Commission shall not exceed the highest rate for a similar attachment charged by any investor-owned electric utility that provides service in an area adjacent to the service territory of the electric cooperative.

In summary, there is currently a three-part regime for regulation of pole attachments in Virginia. First, for pole attachments to IOU facilities, rates are set by mutual agreement of the parties, with the right of appeal to the FCC if an agreement cannot be reached. The FCC applies a cost formula to calculate maximum permissible pole attachment rates. Next, for attachment by telephone cooperatives, mutual telephone associations and small investor-owned telephone utilities, the Va. Code provides that, upon failed negotiations, the Commission has the duty "to determine and establish such terms and the rates to be paid for joint use."²² Finally, for all other attachments to poles, including cable attachments not regulated by the FCC, Virginia law requires good faith negotiation but provides no explicit recourse in the event such negotiations are unsuccessful.

²² Va. Code § 56-41.1(B).

METHODOLOGIES FOR DETERMINING POLE ATTACHMENT RATES

Methodologies for determining pole attachment rates can vary depending on the ratemaking philosophy or public policy objective. Such methodologies range from an incremental approach that would base pole attachment rates on only the incremental or additional costs necessary to allow the pole attachment to a rate-setting approach that would recover the fully allocated costs, or essentially splitting the costs, of poles. The January 31 Letter identified two specific approaches: (i) the FCC formulae, and (ii) a proportionate sharing of the full costs of erecting, owning, operating, and maintaining the entire pole and the full costs of right-of-way maintenance.

The FCC Formulae

The FCC formulae were derived pursuant to the authorization of Section 224 of the Communications Act. Although Section 224 relies on “cost” as the foundation for determining just and reasonable attachment rates, it recognizes that there are a range of ways that “cost” may be interpreted. In particular, Section 224(d)(1) defines a just and reasonable rate as ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on fully allocated costs. The FCC notes that

[t]he additional, or incremental, costs that form the basis for the statutory minimum are the costs that would not be incurred by the utility “but for” the pole attachments. These costs include preconstruction survey, engineering, make-ready, and change-out costs incurred in preparing the pole for attachments. Congress expected a pole attachment rate based on incremental costs to be minimal since most of those costs would have been fully recovered in the make-ready charges already paid by the attacher.²³

²³ *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, para. 128 (Apr. 7, 2011) (internal citations omitted) (hereinafter “April 7 Report and Order”).

The FCC further notes that

[t]he maximum rate for attachments under section 224(d)(1), identified as a percentage of fully allocated costs, reflects a portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles; the percentage is equal to the portion of space on a pole occupied by an attacher.²⁴

In a series of orders dating back to 1987, the FCC has implemented different methodologies to determine the maximum rates for pole attachments – one applied to pole attachments used by telecommunications carriers and the other to pole attachments used “solely to provide cable service.” While these formulae allocated costs of the usable pole space based on the planned use of that available space, they differed with respect to the allocation of costs associated with unusable space on the pole (*i.e.*, space unavailable for attachments). The formula applicable to telecommunications carriers included an allocation of costs based on unusable space and generally resulted in higher pole attachment rates than the cable rate formula, which did not include an allocation of costs related to unusable space.

Earlier this year, the FCC decided that the previously approved formula applicable to telecommunications carriers should be lowered to promote greater deployment of broadband and therefore adopted a revised formula.²⁵ That decision is currently under appeal to the U.S. Court of Appeals for the District of Columbia.²⁶ As revised, the maximum rate applicable to telecommunications carriers is based on the higher rate produced by two separate formulae. While both formulae allocate costs related to usable space and a portion of unusable space using a common definition of “space factor” and the net cost of a bare pole, the formulae differ with respect to the application of the cost factors. One formula utilizes a carrying cost that includes

²⁴ *Id.*, para. 131.

²⁵ *Id.*, para. 135.

²⁶ *Id.*, appeal docketed sub nom *American Elec. Power Serv. Corp., et al., v. F.C.C.*, No. 11-1146 (D.C. Cir. filed May 18, 2011).

capital costs (rate of return, depreciation, and taxes) as well as operating and maintenance costs but discounts the resulting rate by multiplying the rate by 0.66 in urban areas and by 0.44 in non-urban areas. The second formula utilizes a cost factor that excludes capital costs. As such, neither FCC formula reflects the fully allocated cost of pole attachments. In both cases, the cost factor is based on actual booked costs and does not seek to identify incremental administrative costs that may be directly attributable to pole attachment activity. These formulae could result in an under-recovery of pole attachment related costs to the extent that these incremental administrative costs are higher than the average administrative costs allocated to pole attachment rates under the FCC formulae.

Criticism of the FCC Approach

In comments filed with this Commission in Case No. PUE-2011-00033 pursuant to the April 15 Order, the electric utilities and cooperatives criticize the FCC approach and argue that this approach results in cross-subsidization of telecommunications and cable services at the expense of electric customers, cooperative members, and electric utility shareholders. Specifically, APCo notes that the FCC approach "... skews dramatically the sharing of expenses between the electric utility and the telephone, cable television and broadband attachers."²⁷ Dominion states that

[t]he FCC did not follow a traditional ratemaking approach or focus on traditional ratemaking concerns affecting individual utilities and their ratepayers, especially the cross-subsidization of broadband service by the ratepayers and shareholders of Dominion or other Virginia utilities. A more appropriate methodology would avoid promoting a single social or political agenda or the interests of a single industry, but would instead focus on assuring the safety and reliability of the supporting pole infrastructure for *all* industries that rely on it - including broadband - and would apportion the financial obligations associated with the pole infrastructure proportionately among the users of the infrastructure

²⁷ June 22, 2011, APCo comments at 1.

The Virginia Cooperatives maintain that the FCC formula is unfair. They state:

[i]t is important to recognize that the FCC has established different formulas for telecommunications attachments and cable attachments. However, the Cooperatives' cost for each are the same, and neither the FCC's current cable nor its telecommunications pole attachment rate formulas would fairly or fully compensate the Cooperatives for the costs associated with pole attachments. Presently, the Cooperatives bear the entire cost and burden of building and maintaining their pole distribution systems and then incur additional costs solely because another entity seeks to attach to their poles. The Cooperatives urge the Commission to reject any proposals that only seek to enhance the current subsidies enjoyed by attachers. All of the costs associated with pole ownership and maintenance should be fully and fairly (and, justly and reasonably) allocated among all those who benefit from the use of the utility's poles, based on the added cost each imposes on the pole-owning utility. The FCC methodology and formulas do not achieve this result.²⁹

NOVEC states that

[t]he FCC methodology is based on an abstract notion of how a part of the utility costs associated with use of a pole should be allocated. More importantly, the methodology is applied under a philosophy that has the sole mission of promoting broadband deployment at the expense of electric utility customers with little regard for the reliability, integrity, safety or security of the nation's electric power grid. The FCC methodology approach also promotes its mission without regard to the fact that the costs of achieving its goal will be paid for, in other words *subsidized*, by individuals through their electric bills. NOVEC recommends a methodology that directly identifies and recognizes all costs associated with the use of poles and related utility infrastructure and rights of way.³⁰

While proponents of the FCC cable rate, or incremental cost rate, assert that its lower rate will increase broadband deployment, opponents note that the lower FCC rate has not increased

²⁹ June 22, 2011, Virginia Cooperatives comments at 14 (internal citations omitted).

³⁰ June 22, 2011, NOVEC comments at 3-4.

deployment in rural areas and question if the lower rate would increase deployment in other rural communities.³¹

Benefits of FCC Approach

In other comments filed with this Commission in Case No. PUE-2011-00033 pursuant to the April 15 Order, telecommunications and cable television companies support the FCC approach. They generally maintain that the FCC formula is compensatory to electric utilities and will help to encourage the deployment of broadband services. The FCC maintains that its revised rate “is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments.”³² The FCC also states that

[t]he record here demonstrates that pole rental rates play a significant role in the deployment and availability of voice, video, and data networks. Several commenters recognize the value of the Commission’s approach to lower and make more uniform pole attachment rates to “eliminate barriers to broadband deployment,” provide “regulatory certainty,” “promote broadband deployment and competition,” “spur investment,” and “reduc[e] significant indirect costs caused by the existing differences between” the rates paid by competitors.³³

VCTA observes that

[t]he [FCC] Cable Rate Formula was initially adopted by the FCC over 30 years ago and has been upheld by the U.S. Supreme Court. Under the federal Pole Act, a cable attachment rate is considered “just and reasonable” if it allows the utility to recover at least its incremental costs but no more than the fully allocated costs of the attachment. The FCC decided to err on the side of caution by setting its Cable Rate Formula on the absolute *high end* of this statutory range - fully allocated costs.³⁴

³¹ See Tr. at 232-35 (discussing the unavailability of cable service in areas just beyond town limits and in Clarke County, a locality where pole attachment rates were set based on the FCC formula), 264-65 (discussing that companies attaching to poles owned by CVEC do not offer service to the local homes their lines pass).

³² April 7 Report and Order at para. 182.

³³ *Id.* at para. 172 (internal citations omitted).

³⁴ June 22, 2011, VCTA comments at 20 (internal citations omitted).

VCTA further argues that

[a]pplying the [FCC] Cable Rate Formula to electric cooperative pole attachments will best advance the Commonwealth's broadband deployment goals. Virginia's electric cooperatives are outliers with respect to the rents they charge whether compared to national average electric cooperative pole rents or to the rents charged by Virginia's IOUs. Not surprisingly most of the areas served by these electric cooperatives rank extremely low with regard to broadband penetration and adoption in the Commonwealth. Reducing key input costs like pole rents will improve the business case for broadband deployment and network upgrades, particularly at the margin, and therefore expand investment opportunities. Moreover, as previously explained, the Cable Rate Formula (together with make-ready payments) yields a rate that is fully compensatory to pole owners as recognized by the courts, Congress, the FCC and numerous states.³⁵

Shentel states

[t]he Cable Rate Methodology produces reasonable, cost-based rates, has been determined by the U.S. Supreme Court to fairly compensate the pole owner for the costs associated with attachments, is used by the large majority of regulatory bodies having jurisdiction over pole attachment rents, and is easy to administer using publicly available data, including data filed by the Commonwealth's electric cooperatives.³⁶

Fully Allocated Approach

Traditional ratemaking and cost of service principles seek to recover the full cost of service and proportionally share such costs among users based on cost causation principles. While incremental or marginal cost principles may be used to develop rate designs to improve pricing signals on occasion, overall rates are typically designed to recover the total embedded cost of service and not marginal costs. Under this traditional approach, usage categories or classes that do not provide revenues that fully cover a full share of the proportional allocated costs are often characterized as “being subsidized.” With respect to pole attachments, a full

³⁵ *Id.* at 83-84 (internal citations omitted).

³⁶ June 23, 2011, Shentel comments at 4.

cost-based rate would reflect an allocation of all pole-related costs, including operating and maintenance expenses, depreciation, return on investment, and related taxes. The FCC formula does not reflect a fully proportional cost sharing since it allocates only a portion of unusable space and since it either does not include capital costs or discounts a carrying cost that does include capital costs.

Criticisms of Fully Allocated Approach

VCTA states:

[a] common argument asserted by pole owners is that the Cable Rate Formula is a subsidy because it does not require attachers to pay a larger share of pole costs. This contention has been uniformly rejected by the courts, the FCC, numerous states and economists. On many occasions, the Cable Rate Formula has been found to produce rents that are *more than compensatory* because:

- Just compensation for pole attachment rent is the marginal cost of making an attachment.
- Through the make-ready process, cable and other attachers pay all such marginal costs (totaling millions of dollars annually) required to rearrange existing poles or to build sufficiently tall new poles and to correct pre-existing utility and other safety violations in order to attach.
- New poles paid for by cable and other attachers during make-ready become the utilities' property.
- After paying all make-ready charges, cable and other attachers additionally pay rent based upon cable's proportionate share of annual costs of the entire pole - unusable as well as the usable space.

Far from being a subsidy to attachers, pole rent payments represent “found money” for pole owners and help them to fund fixed pole operating expenses that exist whether or not there are any attachers.³⁷

³⁷ June 22, 2011, VCTA comments at 22-23 (internal citations omitted).

Shentel maintains that the rents it

pays to Virginia's IOUs for cable services, established using the Cable Rate Methodology, are reasonable and have played a considerable role in Shentel's plans to bring state-of-the-art broadband digital services to Virginia. In contrast, the exorbitantly high rates being charged by Virginia's electric cooperatives today are not "reasonable," and together with fees imposed for application processing, make-ready, inspections and more, result in electric cooperatives recovering significantly more than the costs caused by attachments. These high rents and make-ready charges create an unnecessary barrier to broadband expansion in the Commonwealth.³⁸

Benefits of Fully Allocated Approach

APCo states

[e]quitable allocation of pole costs requires an equitable allocation of the entire costs of the pole, including the unusable portion of the pole if subsidization of the attachers by electric consumers is to be avoided. It is obvious that an entire pole -- not just the useable space in the upper quadrant of the pole -- is necessary for deployment of aerial facilities; all parties benefit equally from the availability of aerial pole plant and all attachers should pay their allocated portion of that plant. This in no way detracts from an allocation of the actual useable space according to its relative use by each attacher.³⁹

Similarly, Dominion and KU basically argue that a fully proportional cost sharing approach is necessary to avoid cross-subsidization and is fair.⁴⁰

NOVEC also indicates that "[t]raditional ratemaking is effective in eliminating cross-subsidies between NOVEC members and others and promotes the efficient use and longevity of the pole infrastructure."⁴¹

³⁸ June 23, 2011, Shentel comments at 7.

³⁹ June 22, 2011, APCo comments at 1.

⁴⁰ June 22, 2011, Dominion comments at 9-10; June 21, 2011, KU comments at 10.

⁴¹ June 22, 2011, NOVEC comments at 11.

The Virginia Cooperatives contend that a fully allocated approach is necessary to maintain their status as cooperatives under the Utility Consumer Services Property Act (“Cooperatives Act”)⁴² and under federal income tax law.⁴³ They state

[t]he Cooperatives Act, under which the Cooperatives are organized, contains provisions that expressly require that they are ‘not organized for pecuniary profit’ but rather for the mutual benefit of their members. To become and remain a qualified “cooperative” under federal tax law, an electric cooperative must operate “at cost.” The Cooperatives should, therefore, neither operate above cost (for profit) nor below cost. To protect a Cooperative’s status as a “cooperative” under federal tax law, any attacher should fully compensate the Cooperative for the use of its poles or other infrastructure. As a result, the Cooperatives charge cost-based pole attachment rates, rates that are derived using a variety of cost-based rate methodologies, all of which generate reasonable rates. The Cooperatives have never voluntarily adopted the FCC’s existing formulas because they have to use rate methodologies that better assure full cost recovery.⁴⁴

Incremental Approach Versus Full Proportional Sharing

As discussed above, there is a range of possible approaches for establishing pole attachment rates with the lower end of the range represented by an incremental cost approach and the upper end represented by a fully allocated approach. Neither end of the range is necessarily appropriate or inappropriate. The FCC approach represents a hybrid of the two approaches in that it recovers incremental costs and some embedded costs. A number of adjustments can be made to the FCC formula that can shift pole attachment rates upward or downward within this range. In short, there is no one optimal approach. Therefore, the best approach for Virginia is dependent on the desired public policy objective. For example, if the public policy is to pursue the widest deployment of broadband without regard to arguments of

⁴² Va. Code § 56-231.15 *et seq.*

⁴³ The Virginia Cooperatives, in their June 22, 2011, Comments at 13, n.11, refer to the following federal decisions and announcements : *Puget Sound Plywood, Inc. v. Commissioner*, 44 T.C. 305, 308 (1965), acq. 1966-1 C.B. 3; *Buckeye Power, Inc. v. United States*, 38 Fed. Cl. 154 (Fed. Cl. 1997); I.R.S. Announcement 96-24 § (12)22.2(3)(d), 1996-16 I.R.B. 35 (1996).

⁴⁴ June 22, 2011, Virginia Cooperatives’ comments at 13-14 (internal citations omitted).

cross-subsidization, then one would consider a methodology for pole attachment rates based solely on the recovery of incremental rates necessary to accommodate the attachments. If the public policy is to avoid any cross-subsidization, pole attachment rates would be based on the fully allocated costs of poles. Of course, public policy could allow for the exercise of informed judgment within designated parameters.

Commission Pole Attachment Proceedings

To date, the Commission has not established any formula or policy parameters for determining pole rental rates under Va. Code § 56-41.1. However, in 2003, several small investor-owned telephone companies and telephone cooperatives filed a petition with the Commission pursuant to Va. Code §§ 56-41.1 and 56-466.1 requesting that the Commission implement reasonable rates and terms and conditions for telecommunications attachments to poles owned by several electric cooperatives.⁴⁵ The Commission issued a preliminary order directing the electric cooperatives to file their proposed rates and terms for pole attachments with supporting data, assigned the matter to a Hearing Examiner, and directed the Commission Staff to participate in the case.⁴⁶ In this proceeding, the Staff considered the potential rate impact on customers of the electric cooperatives, as well as the potential impact on customers of the telephone companies and telephone cooperatives. The Staff recommended the use of the FCC's telecommunications carrier formula rate (in place at the time) with several modifications. Those modifications affected the percentage of space allocated to the telephone company attachment and the carrying cost used in the formula. Specifically, the Staff proposal (1) assumed a total of

⁴⁵ See *Commonwealth of Virginia, ex rel. NTELOS Telephone Inc., Roanoke and Botetourt Telephone Company, MGW Telephone Company, Pembroke Telephone Cooperative, and Highland Telephone Cooperative v. BARC Electric Cooperative, Shenandoah Valley Electric Cooperative, and Craig-Botetourt Electric Cooperative, For Application of Sections 56-41.1 and 56-466.1 of the Virginia Code to the pole attachment rates of BARC Electric Cooperative, Shenandoah Valley Electric Cooperative, and Craig-Botetourt Electric Cooperative*, Case No. PUC-2003-00087, Doc. Con. Cen. No. 307827, Petition (May 2, 2003) (hereinafter, "Pole Attachment Rate Case").

⁴⁶ Pole Attachment Rate Case, Doc. Con. Cen. No. 314138, Preliminary Order (June 27, 2003).

two attachers per pole instead of the FCC's presumption of three; (2) used two feet for the attachment space instead of the one foot prescribed in the FCC's formula; (3) used the total distribution investment of the electric cooperatives instead of trying to allocate and use only the actual pole costs; and (4) used the cost of capital of the electric cooperatives in the calculation of the carrying cost instead of the FCC formula calculation of carrying cost using only pole accounts.⁴⁷

Subsequent to the filing of testimony, the parties to the proceeding entered into a settlement that resolved the issues before the Commission. The Hearing Examiner reviewed the settlement and issued a report finding that because of the settlement the Commission no longer had jurisdiction pursuant to Va. Code § 56-41.1(B).⁴⁸ The Commission subsequently adopted the Hearing Examiner's findings and dismissed the case without addressing the appropriate methodology for establishing pole attachment rates.⁴⁹

POLE ATTACHMENT RATES AND REVENUES

The January 31 Letter requested information concerning pole attachment rates and revenues. Accordingly, the Commission's April 15 Order sought input from a broad range of persons and entities on pole attachment rates, pole attachment revenues, and the impact of such rates and revenues on utility or cooperative earnings.

⁴⁷ Pole Attachment Rate Case, Doc. Con. Cen. No. 326216, Staff Testimony (Gilmour) at 2-4 and Staff Testimony (Henderson) at 4-6 (Nov. 7, 2003).

⁴⁸ Pole Attachment Rate Case, Doc. Con. Cen. No. 337209, Report of Alexander F. Skirpan, Jr., Hearing Examiner (Apr. 5, 2004).

⁴⁹ Pole Attachment Rate Case, 2004 S.C.C. Ann. Rept. 199, Final Order (Apr. 26, 2004).

Pole Attachment Rates

As can be seen on the following table, current pole attachment rates range widely throughout Virginia.⁵⁰ This broad range is attributable to many factors, including when the rate was established, the basis for such rates, utility cost differences, and type of pole attachment (cable versus telecommunications).

<u>Electric Cooperatives:</u>	<u>Range of Current Annual Pole Attachment Rates</u>
A&N	\$ 6.77 - \$28.08 per attachment
BARC	\$22.82 - \$32.47 per attachment
CBEC	\$27.36 - \$32.19 per attachment
CEC	\$26.59 - \$27.36 per attachment
CVEC	\$16.00 - \$21.06 per attachment
MEC	\$11.39 - \$28.74 per attachment
NNEC	\$18.77 - \$31.75 per attachment
NOVEC	\$ 8.94 - \$32.52 per attachment
PGEC	\$25.70 - \$ 28.01 per attachment
PVEC	\$16.50 - \$19.10 per attachment
REC	\$ 4.21 - \$27.88 per attachment
SEC	\$12.00 - \$24.24 per attachment
SVEC	\$ 3.38 - \$65.41 per attachment
<u>Investor-Owned Electric Utilities:</u>	
APCo	\$ 8.00 - \$49.10 per attachment
Dominion	\$29.00 - \$47.02 per pole
KU	\$ 2.87 per attachment
<u>Telecommunications Companies:</u>	
CenturyLink	\$ 3.25 - \$15.70 per pole
Fairpoint	\$ 2.00 - \$12.00 per attachment
NTELOS	\$ 17.00 per attachment
Pembroke	\$ 2.00 - \$12.01 per pole
Scott County	\$ 2.00 per pole
Shentel	\$ 7.11 per attachment
TDS Telecom	\$ 13.20 per attachment
Verizon-South	\$ 3.39 - \$4.63 per attachment
Verizon-Virginia	\$ 2.35 - \$4.90 per attachment

⁵⁰ The reported rate information was either expressed on a "per attachment" or a "per pole" basis. In many instances, there is only one attacher other than the pole owner. In those instances, the "per attachment" rate and the "per pole" rate would be the same. The Electric Cooperatives provided further clarification and noted that a more appropriate representation of the rate would be "per joint user in a single one-foot space per pole." Note that these rates also include rates charged to cable and telecommunications providers. Additionally, it should be noted that "overlapping" typically is not considered to be a separate attachment and would not be subject to additional pole attachment charges.

Generally, lower rates are associated with cable attachments and were established pursuant to the FCC formulae.⁵¹ The higher rates are typically rates that have been established more recently or were established through negotiation and are associated with telecommunications attachments. However, it should be noted that certain of the higher rates may have been established pursuant to the previous FCC telecommunications formula for pole attachments and that the recently adopted FCC formula could potentially lower the upper end of certain rate ranges. Further, the above ranges do not include arrangements that reflect lump sum agreements or other agreements that do not set forth specific charges per pole or per attachment.

Pole Attachment Revenues and Associated Earnings

The electric IOUs and electric cooperatives filed information with the Commission's Divisions of Energy Regulation and Communications regarding the impact of pole attachment-related revenues on their earnings. The IOUs reported that the earnings impacts associated with pole attachments were negligible or very small. The electric cooperatives indicated that revenues from pole attachment agreements had a negative impact on earnings since their pole attachment-related revenues were less than the associated expenses. This negative impact is largely attributable to: (i) the cooperatives' practice of initially installing larger poles in anticipation of pole attachments agreements; or (ii) ongoing replacement costs for larger poles needed to accommodate pole attachments. Make-ready payments would not be required in the first instance where larger poles are installed in anticipation of future attachments. In the second instance, where make-ready payments may have been collected, the make-ready payments only cover the initial incremental costs and do not provide for additional replacement or higher property taxes that might be attributable to the larger poles necessary for pole

⁵¹ ANEC, SVEC, and REC have acquired service territories previously served by electric IOUs, and the ranges reported for these cooperatives may include pole attachment rates that were originally established by the corresponding electric IOU.

attachments. The cooperatives stated that their earnings would be further reduced if pole attachment rates were developed using the current FCC telecommunications formula.

The Virginia cooperatives⁵² also provided estimates of their expected pole attachment rates if such rates were based on the current FCC formulae or the electric cooperatives' preferred formula, which recovers a proportionate share of all pole-related costs with the exception of a return on investment. The resulting ranges of pole attachment charges from these differing approaches are as follows:

<u>Approach</u>	<u>Range of Annual Charges</u>
FCC Cable Formula	\$ 3.08 - \$7.31
FCC Telecommunications Formula	\$ 6.02 - \$13.03
Cooperative Preferred Formula	\$23.59 - \$51.70

The cooperatives also provided their total pole attachment revenues and estimates of the impact of the FCC formulae on those revenues. In 2010, the aggregate pole attachment revenue received by the cooperatives was \$4.34 million. The cooperatives estimate that this revenue would be reduced to \$1.67 million, or a reduction of 61%, if the FCC formulae were used to determine cooperative pole attachment rates.

The electric IOUs and telecommunications companies also reported their pole-related revenues to the Commission's Division of Energy Regulations. In 2010, the electric IOUs and the telecommunications companies collected aggregate pole attachment revenues of \$17.8 million and \$2.1 million, respectively.

⁵² This information was provided on a voluntary basis and was not provided in response to a specific request. NOVEC did not provide this specific information.

POLE ATTACHMENT AGREEMENTS

Model Pole Attachment Agreement

Generally, the commenters stated that creating a model agreement would be difficult and impractical. Some commenters suggested provisions or necessary elements for agreements. Others suggested the possible adoption of best practices while several provided draft model agreements.

The electric cooperatives suggest that a model agreement would need to address the rights of the pole owners and focus on liability, safety, make-ready work, unauthorized attachments, easements and rights-of-ways, code compliance, inventory and audits, and attachment rates. Concerns of the cable and telecommunications companies include overlashing, timeframes, licensing, shared use of easements, safety inspections, audits, pole replacements, billing details, and rates.

The Commission agrees that an effort to develop a model pole attachment agreement would be very time-consuming and may be premature at this point. As the parties' filings demonstrate, they have very different interests and concerns, and the issues are complex. If legislation is enacted, it may be preferable for such legislation to include any General Assembly policy objectives.

Generally, the parties currently operate pursuant to negotiated pole attachment agreements, and no party has suggested that such arrangements should not continue. However, there are increasingly critical issues with respect to the timing, scope, rates, and certain terms of such agreements that may ultimately need to be adjudicated. The following section discusses options for the framework for negotiation. However, there are other non-contractual approaches

for addressing pole attachment agreements that may work separately, alternatively, or in conjunction with negotiated pole attachment agreements.

For example, in some states, the pole owner's tariffs contain the rates, terms, and conditions applicable to pole attachments. A pole attachment tariff could be offered as the primary vehicle for such attachments or utilized to establish the parameters for negotiated agreements, or it could be used as an interim arrangement while negotiations are underway. Two advantages of a tariffed offering are that (i) it is publicly available to potential attachers; and (ii) it is subject to applicable regulatory scrutiny.

Another potential model for consideration is similar to a tariff. The Federal Telecommunications Act of 1996 ("Telecommunications Act")⁵³ permits a Bell Operating Company ("BOC") to submit a "Statement of Generally Available Terms" ("SGAT") with a state commission to comply with interconnection requirements set forth in § 251 of the Telecommunications Act. The state commission has sixty (60) days to review the SGAT unless the submitting party agrees to an extension. The SGAT is permitted to go into effect after the sixty (60) days unless the state commission takes action to the contrary. The availability of an SGAT in any state does not relieve the BOC from its duty to negotiate the terms and conditions of an interconnection agreement under § 251 of the Telecommunications Act.

Finally, legislative solutions, whether they include a tariff or a mechanism such as the SGAT, may need to address current gaps in the Commission's regulatory authority, given that a significant number of parties to pole attachment agreements are not otherwise subject to the Commission's jurisdiction, such as cable television providers.

⁵³ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 252(f)).

Framework for Negotiations

Generally, the parties agreed that the basic framework for negotiations should be “good faith” negotiations. The electric cooperatives suggested that a time limit be established for negotiations to prevent attachers from continuing under expiring agreements. VCTA suggested a need for a mechanism for attachers to challenge electric pole attachment rates, terms, and conditions. The telecommunications companies suggested that there should be a streamlined process for Commission resolution of disputes.

In addition to support for negotiation, there appears to be at least some general consensus that there may be a need for some, albeit limited, parameters established to guide the negotiations process when necessary.

Legislation could be enacted giving the Commission oversight of situations in which the parties are unable to agree after good faith negotiation and establishing policy goals or parameters to guide Commission resolution of disputes. An equitable approach could focus on establishing and enforcing reasonable timelines applicable to all parties for negotiating in good faith and streamlining procedures for considering unresolved issues between the parties.

Dispute Resolution

Generally, the parties stated that they should have a right to seek resolution either from the Commission or private arbitrators. The electric cooperatives recommended private arbitrators but expressed openness to other alternatives, including adopting a Commission procedure similar to that in place for certain telecommunications disputes. VCTA and telephone companies supported the right for redress pursuant to Commission procedural rules although they asserted that the process should be streamlined and efficient. Several parties also suggested the right to seek the Commission Staff’s assistance.

Currently, parties have the right to seek redress from the Commission (to the extent that the Commission has statutory oversight) pursuant to the Commission's Rules of Practice and Procedure (5 VAC 5-20-10 *et seq.*). However, as discussed herein, the Commission's authority is limited to disputes between designated types of parties representing only a small subset of pole attachment agreements. Parties also may include other dispute mechanisms (*i.e.* arbitration) in negotiated pole attachment agreements.

The Commission already has in place its Rules for Alternative Dispute Resolution Process, 20 VAC 5-405-10 *et seq.* ("ADR Rules" or "Rules"). These Rules are currently limited to disputes between telecommunications carriers; however, the Rules could be modified to include pole attachment disputes or could be used as a model for establishing specific alternative dispute resolution procedures for pole attachment disputes, assuming that the Commission is granted authority to resolve such disputes.

The ADR Rules provide for a party to notify the Office of Hearing Examiners thirty (30) days in advance of filing a petition and for the parties to use that time for good faith negotiations. In addition, the ADR Rules establish timelines and procedures for filing and responding to petitions, as well as assignment of the case to a Hearing Examiner with ultimate decision by the Commission. Upon the filing of a petition, the Hearing Examiner is to conduct a prehearing conference as well as an evidentiary hearing. The ADR Rules also provide for mediation by the Staff (upon request) and do not replace or preclude other procedures or remedies that may be available to any of the carriers.

RELIABILITY AND SAFETY CONCERNS

The January 31 Letter sought information regarding safety and electric systems reliability issues associated with pole attachments and regarding the need for penalties associated with unauthorized or inappropriate attachments.

Unauthorized or Inappropriate Attachments

Reliability and safety issues can arise as a result of inappropriate installation procedures. Unauthorized attachments can compound these concerns as well as fail to provide compensation for attachments. In this regard, the Virginia Cooperatives state:

Electric cooperatives report that, historically, as many as 40% of all pole attachments are unauthorized. In order to police and account for all communications attachments made to the Cooperatives' poles, the Cooperatives must conduct periodic surveys of the attachments on their systems. In addition to performing site visits to each pole, the Cooperatives incur additional labor, transportation, and contractor costs in reviewing the survey results, recording and archiving the data, notifying the unauthorized attachers, issuing billings, and collecting fees from the offending cable and telecommunications provider. Some of the Cooperatives have taken on additional staff to handle these matters. In addition, in many instances the unauthorized attachments create significant public safety violations including but not limited to: inadequate ground and road clearances; inadequate pole strength; inadequate clearance for line workers; and electrical hazards to workers and the public.⁵⁴

NOVEC filed extensive comments regarding safety and reliability issues associated with pole attachments. NOVEC stated that it

has found that many telecommunications companies make their attachments in such a manner that prevents its line crews from climbing the pole and accessing electric facilities. The obstructions created by telecommunication and cable companies have included attachments installed on both sides of the pole (boxing), the attachment of signal boosting devices, multiple cable attachments, multiple over-lashed cables, electric service entrance risers, attachment of terminal and junction boxes, cable

⁵⁴ June 22, 2011, Virginia Cooperatives comments at 26.

attachments lashed to other communications companies' attachments on the same pole, in addition to attachments made in violation of the National Electric Safety Code ('NESC') and Virginia Department of Transportation ('VDOT') roadway crossing and road clearance requirements."⁵⁵

NOVEC further indicated that it

identifies communication facilities that are installed on its poles in violation of the NESC and VDOT over-the-road clearance regulations. NOVEC notifies the offending communication companies with attachments in violation of these codes and regulations and undertakes the design and construction activities required to correct the violations. Corrective action sometimes requires the replacement of the existing pole with a taller pole. While the design and construction costs are billable to the communication companies, the administrative costs associated with notification, numerous trips to the job sites, recordkeeping, and invoice and payment processing are generally not reimbursed. In many instances, the communication facility installed in violation of these codes has resulted in outages to NOVEC's customers.⁵⁶

NOVEC stated that it

must undertake periodic inspections of poles in order to ensure compliance with the NESC, maintain service reliability, and manage a planned replacement program for poles identified as unsuitable for continued service. In addition to the physical inspection of the poles, NOVEC must perform pole loading analysis of all attachments to the pole, including the cable and telecommunications company attachments.⁵⁷

The electric utilities and cooperatives presented additional evidence and testimony regarding unauthorized attachments, safety, and reliability issues at the July 13, 2011 public hearing. During the hearing, Dominion's representative stated that any policy should include

the recognition that the infrastructure is critical and safety and reliability are of paramount concern. . . . [U]nauthorized attachments . . . are a serious issue. In a recent review of just one district, Dominion Virginia Power found that out of 21,000

⁵⁵ June 22, 2011, NOVEC Comments at 21.

⁵⁶ *Id.* at 22.

⁵⁷ *Id.*

attachments in that district, 7,000 were unauthorized. . . . [T]hat's a third of the attachments in just that district.

Now, that creates safety issues on two levels. Number one, when an attachment is unauthorized, it means the utility doesn't even know it's there. Every pole is engineered so that it doesn't have structural issues that can be -- become critical during an ice storm, for example. If we don't know an attachment is there, we haven't done our homework, we don't know whether that pole is going to stand, or fall, or what the issues may be. . . . [T]hat's a major safety issue. It's also an issue that is critical to reliability of electric service.

The other safety issue is . . . compliance -- basic compliance with codes. If an attaching party doesn't go through the permitting process and have the *ex ante* review of its attachment, the opportunity to assure code compliance is zero; the probability that the code is not being complied with, significant. And who's doing the paying for all of this? Electric utility ratepayers. That is an absolute cross-subsidy, while the rent is going unpaid from -- directly from the utility ratepayer to the cable company. That's not appropriate.⁵⁸

The Dominion representative also noted specific concern with overlashing, the instance

where you have an existing communications line and someone wraps another communications line around it so that you get essentially two lines on one attachment. [Overlashing] has very significant safety and reliability implications. . . . [Y]ou're increasing the diameter of the attachment. During an ice storm, all of that new surface area holds ice. The weight associated with that and the tension on the pole goes up dramatically.

Now, if the utility is notified in advance so that it knows what's going up, it can check its engineering on the poles before the ice storm happens and knows what it's dealing with. If it doesn't have notice of that overlashing, it can't. . . . [E]very time you have an ice storm and you see poles breaking because of ice loading, and you've got attaching parties on those lines, I can pretty much assure you as a matter of physics that the attaching parties certainly contributed to the weight loading. And whether that weight loading was or was not material to the failure is just a question for the forensic engineers to come in and figure out.⁵⁹

⁵⁸ Tr. at 184-85.

⁵⁹ *Id.* at 194-195.

VCTA disputes that there are significant reliability and safety issues associated with pole attachments. VCTA hired an engineer to conduct a field inspection of poles owned by five electric utilities and cooperatives. VCTA's expert noted that while there were some discrepancies, the bulk of the discrepancies "were not caused by cable or other third party attachments but instead were created by the electric utilities years after the poles were initially constructed and cable attachments were made, as rural areas were developed and homes and businesses replaced open fields and unpopulated areas."⁶⁰ VCTA concluded that "contrary to claims made by some electric cooperatives, there was no 'correlation between high pole attachment rents and increased NESC compliance.'"⁶¹

Need for Penalties

The electric utilities and cooperatives generally maintain that there is a need for penalties for unauthorized attachments. The Virginia Cooperatives stated that "penalties are needed to enforce compliance with the Cooperatives' property rights and the terms of Joint Use Agreements, as well as to insure that communications attachments are placed on poles in a safe and proper manner, as approved by the Cooperatives."⁶² Dominion commented:

There is a need for penalties to encourage compliance with property rights and permitting requirements, in terms of both making the attachment as well as making the attachment in a safe and proper manner, as approved by the pole owner. The primary purpose of the pole infrastructure is to support the safe and reliable delivery of electric power. Safety of the public, of communications workers, and of electric utility workers is the primary concern. Safety can only be achieved if facilities installed on the poles are installed in accordance with applicable safety codes and electric company construction standards. The pole

⁶⁰ June 22, 2011, VCTA comments at 75.

⁶¹ *Id.* at 76.

⁶² June 22, 2011, Virginia Cooperatives Comments at 26.

attachment permitting process is the primary means by which the utility ensures that these codes and standards are followed.⁶³

VTIA agreed that penalties were appropriate but noted that “penalties are only appropriate after proper notice and an opportunity to cure have been given.”⁶⁴ VCTA disagreed that penalties are appropriate and stated, “There is no need for penalties for unauthorized or inappropriate pole attachments. There is no evidence that Virginia cable operators are ignoring the permitting requirements of electric cooperatives or attaching with disregard for governing safety standards.”⁶⁵

Oversight Issues

While it appears that inappropriate attachments can give rise to safety and reliability issues and that unauthorized attachments can compound these concerns, there is some dispute as to the extent of such concerns and as to whether these concerns are caused by the pole owner or the attacher. The Commission believes that these concerns can be quite serious as they can have an adverse impact on reliability and pose significant safety concerns. Additionally, it appears that unauthorized attachments are a significant concern. These issues are currently being handled or self-policed by the pole owners and the attachers. The electric utilities and cooperatives generally maintain that additional independent oversight is needed. Additionally, the electric pole owners believe that there should be significant penalties for inappropriate or unauthorized attachments. VTIA acknowledges the need for penalties but indicates that penalties are only appropriate after notice and an opportunity for corrective action. This also implies the need for independent oversight.

⁶³ June 22, 2011, Dominion comments at 7.

⁶⁴ June 22, 2011, VTIA comments, Attachment 1 at 1, Response 4.

⁶⁵ June 22, 2011, VCTA comments at 4.

The Commission believes that while there is some indication that additional oversight may be needed with respect to pole attachment-related safety and reliability issues, it is unclear how extensive such oversight should be. Effective independent oversight could range from a process based on complaints with independent arbitration to one with aggressive investigation and code enforcement. Aggressive investigation and enforcement would entail the creation of a specific regulatory body or add to the responsibilities of an existing agency. In either event, an aggressive approach would require additional personnel, training, and development of regulations and could be expensive, placing a significant cost burden on the responsible agency. In light of the potential cost of an aggressive enforcement approach and the uncertainties of the magnitude of pole attachment reliability and safety-related problems, the Commission believes that, should the General Assembly decide that additional independent oversight is needed, an appropriate first step would be to provide for a complaint-based approach with the potential for penalties after appropriate investigation.

PUBLIC POLICY CONSIDERATIONS

There are numerous federal and state directives encouraging broadband deployment. The Internet has changed the way individuals, businesses, communities, educational institutions, healthcare, and governments communicate and provide services. Broadband is the infrastructure necessary to provide such access and opportunities.

In 2007, Governor Kaine launched the Virginia Broadband Roundtable (“Broadband Roundtable”) consisting of individuals from academia and industry, local and regional leaders, legislators, and state agency representatives. In September 2008, the Broadband Roundtable issued a report with various recommendations. The report observed:

Growing sentiment in the Commonwealth that universal access to affordable broadband is a prerequisite for economic growth, educational excellence, healthcare reform and job creation; [the] crux of [the] concern is the growing geographically imposed digital divide as many rural communities continue to lack access to affordable broadband infrastructure.⁶⁶

The American Recovery and Reinvestment Act of 2009 (“ARRA”)⁶⁷ provided the Department of Agriculture’s Rural Utility Service (“RUS”) and the Department of Commerce’s National Telecommunications and Information Administration (“NTIA”) with \$7.2 billion for grants and loans to expand broadband access services throughout the United States. As part of the ARRA, Congress directed the FCC to develop a National Broadband Plan to ensure that every American has “access to broadband capability.” The National Broadband Plan states:

Like electricity a century ago, broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.⁶⁸

The parties did not disagree on the value or need for broadband deployment, particularly to unserved and underserved rural areas of the Commonwealth. However, their views differed on what, if any, impact there may be between pole attachment rates and broadband deployment. The electric cooperatives argued that there is no relationship between the rates and broadband deployment. Conversely, the cable and telecommunications companies argued that using the FCC Cable Rate Formula to establish pole attachment rates of electric cooperatives will encourage broadband deployment.

⁶⁶ Commonwealth Broadband Roundtable, Final Report to Gov. Timothy M. Kaine, Report Document 440 at 8 (Sept. 9, 2008), available at: [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4402008/\\$file/RD440.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4402008/$file/RD440.pdf).

⁶⁷ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 516 (2009).

⁶⁸ Federal Communications Commission, Connecting America: The National Broadband Plan at XI (Mar. 16, 2010), available at: <http://www.broadband.gov/plan/>.

The FCC issued the National Broadband Plan on March 16, 2010. Among many recommendations and goals in the Plan, Chapter 6 addressed infrastructure and made the following recommendations regarding pole attachments:

- 6.1: The FCC should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment.⁶⁹
- 6.2: The FCC should implement rules that will lower the cost of pole attachment “make-ready” process.⁷⁰
- 6.3: The FCC should establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access.⁷¹
- 6.4: The FCC should improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.⁷²
- 6.5: Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights of way.⁷³
- 6.6: The FCC should establish a joint task force with state, Tribal and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way.⁷⁴

The National Broadband Plan contends that the impact from pole rental rates on the provision of cable and telecommunications services can be more acute in rural areas because there “are often more poles per mile than households.”⁷⁵ According to the FCC:

⁶⁹ *Id.* at 128.

⁷⁰ *Id.* at 129.

⁷¹ *Id.*

⁷² *Id.* at 130.

⁷³ *Id.*

⁷⁴ *Id.* at 131

⁷⁵ *Id.* at 128.

In a rural area with 15 households per linear mile, data suggest that the cost of pole attachments to serve a broadband customer can range from \$4.54 per month per household passed (if cable rates are used) to \$12.96 (if [incumbent local exchange carrier] rates are used). If the lower rates were applied, and if the cost differential in excess of \$8 per month were passed on to consumers, the typical monthly price of broadband for some rural consumers could fall materially. That could have the added effect of generating an increase-possibly a significant increase-in rural broadband adoption.⁷⁶

The National Broadband Plan's view that lower pole attachment rates will likely result in lower broadband prices and increased deployment may have merit to the extent that lower pole attachment rates improve the feasibility of extending broadband to areas with lower customer concentrations. However, it does not consider or reflect the potential impact on the customers of the company (*i.e.* electric utility) that owns the pole. For example, to the extent that an electric utility derives less revenue if its pole attachment rates are lowered, those revenues can result in increased rates to electric customers. Additionally, there may be areas where the deployment of broadband is not economic even with lower pole attachment rents.

Ultimately, it is a public policy matter to determine the extent to which initiatives are necessary to encourage the availability of broadband throughout the Commonwealth. If the Virginia General Assembly finds that the level of rates for pole attachments charged by pole owners should be regulated at the state level, it may find it appropriate to enact legislation specifying the General Assembly's goals and providing regulatory parameters.

WIRELESS CARRIER ISSUES

CTIA, VWA, Windstream, and T-Mobile filed comments with the Commission. These parties did not specifically address the Commission's questions posed for this Report. Generally, the wireless industry supports the FCC's regulations, particularly the FCC's recognition that

⁷⁶ *Id.*

wireless carriers are entitled to pole attachments with IOUs pursuant to Section 224 of the Federal Telecommunications Act as telecommunications carriers. The parties point out the importance of wireless carriers, components, and facilities in the expansion of broadband services in Virginia and the nation.

While not addressed by the parties, it should be noted that wireless carriers may not be statutorily entitled to pole attachments from electric cooperatives under the Va. Code as it currently exists because they are neither cable television systems nor telecommunications service providers pursuant to Va. Code § 56-466.1. Section 56-466.1(A) describes a telecommunications service provider as a “public service corporation or public service company that holds a certificate of public convenience and necessity [”CPCN”] to furnish local exchange telephone service or interexchange services.” The Commission does not have regulatory jurisdiction over the operations of wireless carriers, and these carriers do not possess CPCNs.



COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

APPENDIX A

TERRY G. KILGORE
POST OFFICE BOX 869
GATE CITY, VIRGINIA 24291

FIRST DISTRICT

January 31, 2011

COMMITTEE ASSIGNMENTS:
COMMERCE AND LABOR (CHAIRMAN)
COURTS OF JUSTICE
MILITIA, POLICE AND PUBLIC SAFETY

The Honorable James C. Dimitri
Virginia State Corporation Commission
P.O. Box 1197
Richmond, VA 23218

Dear Chairman Dimitri:

By this letter, we request that the State Corporation Commission undertake a study to determine and recommend appropriate regulation of pole attachments and cost sharing in Virginia.

During the 2011 General Assembly session, the House of Delegates Commerce and Labor Committee considered HB 1439, patroned by Delegate Bill Janis, which would have given the Commission jurisdiction over rates, terms and conditions of pole attachment agreements by cable and telephone companies on electric cooperative poles, after negotiations failed to produce agreements, with Commission to use the Federal Communications Commission ("FCC") methodology and formula for invested-owned utilities. The Senate Commerce and Labor Committee similarly considered a parallel bill, SB 890, patroned by Senator Wampler.

After conferring with the bill patron, the House Committee voted unanimously to defer action on the House bill this year, on the understanding that I would request that the Commission study and report on the subject matter of the bill and related issues so that these can be fully considered in the 2012 General Assembly session. I understand that the Senate Committee will also defer action on the Senate bill pending receipt of this report.

You are hereby requested, through the joint efforts of your Energy and Communications Divisions, to prepare and issue a report to the House Committee on or before November 1, 2011, containing detailed standards and recommendations on electric cooperative pole attachment issues in the Commonwealth, including without limitation, an analysis of the following issues:

1. An analysis of current electric cooperative pole attachment rates, including without limitation, the pole attachment rates charged by each electric cooperative, and aggregate pole attachment revenues for each electric cooperative.
2. Whether the incremental cost methodology and formula could be implemented in Virginia (see 47 USC § 224—as an example, not necessarily the formula).
3. Creation of a model pole attachment agreement and pole rate formula for suggested use by electric cooperatives and cable and telephone attachers to electric cooperative poles (who do not desire

a joint use agreement) addressing issues such as unauthorized attachments, overloading, pole replacements, and all non-annual rent issues, as well as an annual rent formula.

4. Creation of a suggested negotiating framework for parties in negotiating or disputing pole attachment agreement issues, before going to the Commission to resolve disputes.
5. Does the Commission interpret Va. Code 56-41.1 to already provide it with jurisdiction to regulate electric cooperative pole attachments for "small investor-owned telephone utilities"?
6. Just and reasonable compensation for a proportionate share of the full costs of erecting, owning, operating and maintaining the entire pole and of the full costs of right of way maintenance.
7. Safety and electric system reliability issues, including, without limitation, compliance with the National Electric Safety Code, Virginia Department of Transportation road crossing clearance requirements and other relevant safety codes and requirements, technical specifications, guying requirements and electric service interruption.
8. What appropriate planning, operating policies, and procedures will be required of attachers?
9. Whether there is appropriate and effective Commission jurisdiction over all joint users of utility poles.

In preparing this report, please issue appropriate requests for information from pole attachers and utility pole owners and solicit the views of any other interested parties to elicit the necessary information. In considering these issues, you should consider the need for rural broadband deployment in the Commonwealth, the economic development interest of government and business interests, the interests of existing and potential cable, telephone and broadband customers, the interests of utility customers, owners of poles and the safety of utility infrastructure and workers on utility poles, and efficiency in use of public and utility rights of way.

Sincerely,


Terry G. Kilgore


Richard L. Saslaw

Cc: The Honorable Mark C. Chrisite
The Honorable Judith Williams Jagdmann

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AT RICHMOND, APRIL 15, 2011

APPENDIX B
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CLERK'S OFFICE
2011 APR 15 PM 2:10
DOCUMENT CONTROL

COMMONWEALTH OF VIRGINIA,

At the relation of the

STATE CORPORATION COMMISSION

CASE NO. PUE-2011-00033

Ex Parte: In the matter of determining
appropriate regulation of pole attachments
and cost sharing in Virginia

**ORDER ESTABLISHING PROCEEDING
AND SCHEDULING HEARING**

During the 2011 Session of the Virginia General Assembly ("General Assembly"), the House of Delegates Commerce and Labor Committee ("House Committee") considered HB 1439, which would have given the State Corporation Commission ("Commission") jurisdiction over rates, terms and conditions of pole attachments by cable and telephone companies on electric cooperative poles after negotiations failed to produce agreements. As introduced, HB 1439 required the Commission to set the rates, terms, and conditions for pole attachments using the principles established by the Federal Communications Commission ("FCC") in regulations and case law pursuant to 47 U.S.C. § 244. HB 1439 also stated that the Commission could not establish a pole attachment rate higher than the highest rate for a similar attachment charged by a nearby investor-owned utility. A similar bill, SB 890, was considered by the Senate Commerce and Labor Committee. Subsequently, the House Committee elected to defer consideration of HB 1439 pending completion of a Commission study on the subject matter of the bill and related issues.

By letter dated January 31, 2011 ("January 31 Letter"), Delegate Terry G. Kilgore and Senator Richard L. Saslaw requested that the Commission "prepare and issue a report to the

House Committee on or before November 1, 2011, containing detailed standards and recommendations on electric cooperative pole attachment issues in the Commonwealth."¹

Accordingly, the Commission will undertake an investigation of the issues related to electric cooperative pole attachments and will receive public comment to enable a comprehensive report on such issues.

NOW THE COMMISSION is of the opinion that we should receive input from the broadest range of persons and organizations having an interest in issues related to pole attachment agreements within the Commonwealth. Accordingly, we will direct that notice of this proceeding be given to the Office of the Attorney General, Division of Consumer Counsel, and to the following incumbent electric utilities, cooperative and municipal providers of electric service, and telecommunications service providers: A&N Electric Cooperative, B-A-R-C Electric Cooperative, Central Virginia Electric Cooperative, Community Electric Cooperative, Craig Botetourt Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Northern Virginia Electric Cooperative, Old Dominion Electric Cooperative, Powell Valley Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative, Southside Electric Cooperative, Virginia Electric and Power Company, Appalachian Power Company, Kentucky Utilities Company, Amelia Telephone Corporation, Buggs Island Telephone Cooperative, Burke's Garden Telephone Exchange, Central Telephone Company of Virginia, Citizen's Telephone Cooperative, Highland Telephone Cooperative, MGW Telephone Company, New Castle Telephone Company, New Hope Telephone Cooperative, NTELOS Telephone Inc., Pembroke Telephone Cooperative, Peoples Mutual Telephone Company, Roanoke and Botetourt Telephone Company, Scott County

¹ A copy of the January 31 Letter is attached hereto.

Telephone Cooperative, Virginia Telephone Company, Shenandoah Telephone Company, Verizon Virginia Inc., Verizon South Inc., Central Telephone Company of Virginia, and United Telephone Southeast LLC (collectively "Utility Pole Owners").

We will direct the Clerk of the Commission to provide the Utility Pole Owners with copies of the Order Establishing Proceeding and Scheduling Hearing ("Scheduling Order"). Because the Commission has been asked to solicit information from any other interested persons or entities regarding pole attachment agreements, we will also require each of the Utility Pole Owners to provide a copy of this Scheduling Order to each entity that is a party to a pole attachment agreement with that Utility Pole Owner.

We further direct the Commission Staff ("Staff"), including the Divisions of Energy Regulation and Communications, to identify other persons or entities that potentially may have an interest in this proceeding and to provide them with copies of this Scheduling Order by electronic transmission or, when electronic transmission is not possible, by first class mail.

We will provide the Utility Pole Owners and any other interested person or entity an opportunity to provide written and/or oral comments on the issues under consideration in this proceeding as listed in the January 31 Letter. Specifically, we seek comments addressing the following questions:

1. Is it appropriate for the Commission to use the FCC methodology for establishing electric utility and cooperative charges for pole attachments by telephone, cable television and broadband providers? What revisions, if any, to the FCC's methodology are necessary to produce appropriate charges for pole attachments?
2. Are there other more appropriate methodologies for determining appropriate charges for pole attachments by telephone, cable television and broadband providers? What are the required elements of any such formulae?

3. What are the necessary elements or terms of a model pole attachment agreement including any necessary restrictions or conditions concerning overlashing, pole replacements, safety and reliability?
4. Is there a need for penalties for unauthorized or inappropriate pole attachments? If so, what are the appropriate bases for any such penalties?
5. What framework should be applied for parties negotiating pole attachment agreements?
6. How should disputes related to the development or administration of pole attachment agreements be resolved?
7. Does the Commission have the necessary authority to establish rates charged by electric utilities and cooperatives for pole attachments by telephone, cable television and broadband providers?
8. What constitutes just and reasonable compensation for pole attachments?
9. Is proportionate sharing of the full costs of erecting, owning, operating and maintaining the entire pole including right of way maintenance by all users of a pole appropriate?
10. Are there safety and electric system reliability issues associated with pole attachments by non-electric utility service providers, including, without limitation, compliance with the National Electric Safety Code, Virginia Department of Transportation road crossing clearance requirements and other relevant safety codes and requirements, technical specifications, guying requirements and electric service interruption?
11. Is there a need for the establishment of pole attachment related planning, installation, operating or maintenance procedures for non-utility service providers and, if so, what are the required procedures?
12. Is there appropriate and effective Commission jurisdiction over all joint users of utility poles?

13. Does: a) the need for rural broadband deployment in the Commonwealth; b) the economic interests of governments and businesses; c) the interests of existing and potential cable, telephone and broadband customers; d) the interests of utility customers and owners of poles; e) the safety of utility infrastructure and workers on utility poles; or, f) efficiency in use of public and utility rights of way require a particular methodology for establishing pole attachment rates and procedures?

Further, the January 31 Letter requested the Commission analyze pole attachment rates and aggregate pole attachment revenues. Accordingly, we will direct that the Utility Pole Owners file the following information, where available, with the Commission's Divisions of Energy Regulation and Communications as soon as possible but no later than May 27, 2011:

1. The rates charged each non-electric service provider for pole attachments.
2. The basis used to determine any such rates.
3. Aggregate pole attachment revenues received during the last three calendar years.
4. An estimate of the contribution of aggregate pole attachment revenue to the electric utility's return on equity or cooperative's tier.
5. An estimate of the contribution of pole attachment revenue to the electric cooperative's tier assuming that pole attachment charges were determined by use of the FCC methodology.
6. An estimate of the contribution of pole attachment revenue to the electric cooperative's tier, assuming that pole attachment charges were determined by a proportionate sharing of the full costs of erecting, owning, operating and maintaining the entire pole including rights of way maintenance, by all users of a pole.

Finally, we will direct that a public hearing be set to receive comments regarding the issues under consideration in this proceeding.

Accordingly, IT IS ORDERED THAT:

- (1) This case is docketed and assigned Case No. PUE-2011-00033.
- (2) The Clerk of the Commission hereby is directed to provide a copy of this Scheduling Order to the above-named Utility Pole Owners subject to the Commission's jurisdiction.
- (3) Within five (5) business days of the filing of this Scheduling Order with the Clerk of the Commission, the Staff shall transmit electronically or by first class mail copies of this Scheduling Order to those persons and entities, other than Utility Pole Owners, identified by the Staff as potentially having an interest in this proceeding. The Staff shall file with the Clerk of the Commission a certificate of transmission or mailing and include a list of names and addresses of the persons and entities to whom the Scheduling Order was transmitted or mailed.
- (4) On or before May 10, 2011, all Utility Pole Owners shall provide a copy of this Scheduling Order to any entity that is a party to a pole attachment agreement with such respondent.
- (5) On or before May 27, 2011, all Utility Pole Owners shall provide proof of the provision of this Scheduling Order to parties to pole attachment agreements, as required in Ordering Paragraph (4).
- (6) On or before June 15, 2011, interested persons or entities may file comments with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P. O. Box 2118, Richmond, Virginia 23218. Comments shall refer to Case No. PUE-2011-00033 and address the specific questions and issues raised in this Scheduling Order. Those desiring to submit comments electronically may do so by following the instructions available at the Commission's website: www.scc.virginia.gov/case.

(7) On or before June 15, 2011, all Utility Pole Owners shall file with the Commission's Division of Energy Regulation the six (6) pieces of information identified herein concerning pole attachment rates, revenue, and revenue contribution estimates, where such information is available.

(8) A public hearing shall be convened on July 13, 2011, at 10:00 a.m. in the Commission's Courtroom, Second Floor, Tyler Building, 1300 East Main Street, Richmond, Virginia 23219, to receive comments regarding the issues under consideration in this proceeding.

(9) This matter is continued.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all entities as noted herein and to C. Meade Browder, Jr., Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219. A copy shall be delivered to the Commission's Office of General Counsel and Divisions of Economics and Finance, Energy Regulation, and Communications.

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a joint use agreement) addressing issues such as unauthorized attachments, overloading, pole replacements, and all non-annual rent issues, as well as an annual rent formula.

4. Creation of a suggested negotiating framework for parties in negotiating or disputing pole attachment agreement issues, before going to the Commission to resolve disputes.
5. Does the Commission interpret Va. Code 56-41.1 to already provide it with jurisdiction to regulate electric cooperative pole attachments for "small investor-owned telephone utilities"?
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In preparing this report, please issue appropriate requests for information from pole attachers and utility pole owners and solicit the views of any other interested parties to elicit the necessary information. In considering these issues, you should consider the need for rural broadband deployment in the Commonwealth, the economic development interest of government and business interests, the interests of existing and potential cable, telephone and broadband customers, the interests of utility customers, owners of poles and the safety of utility infrastructure and workers on utility poles, and efficiency in use of public and utility rights of way.

Sincerely,


Terry G. Kilgore


Richard L. Saslaw

Cc: The Honorable Mark C. Chrisite
The Honorable Judith Williams Jagdmann