PSB Rule 3.700 - Pole Attachments

Policy Explanation and Summary of Comments

I. INTRODUCTION

The Board has regulated pole attachment rates at least since 1984. At that time, Congress passed a major cable television deregulation bill that, among other things, assured cable access to utility poles.[1] It requires pole owners to allow cable systems to attach to poles, and it directs the Federal Communications Commission ("FCC") to set rates. The same statute, known as "Section 224,"[2] was also amended by the federal Telecommunications Act of 1996 to provide mandatory attachment and rates for competitive local exchange carriers ("CLECs").

Under Section 224, states may preempt the FCC rules. Vermont has done so. The Board's current rule, adopted in 1984, applies only to cable television companies. It contains a formula for calculating the prescribed fee when a cable TV operator attaches to a pole. The fee is based on the "fully allocated cost," that is, the sum of operating expenses plus capital cost. The current rule allocates cost based upon the space occupied by the cable TV attachment as a percentage of *usable* space. Basically, "usable space" is all space on the pole above the lowest possible point of attachment. However, under the current rule, "usable space" excludes the 40 inch "safety space" required between the lowest electric wire and the highest communications wire.

The Board initially submitted a Final Proposed Rule on February 2, 2001. With the permission of the Legislative Committee on Administrative Rules, the Board has now submitted a Second Final Proposed Rule that differs in numerous details from the earlier edition.

II. THE SECOND FINAL PROPOSED RULE

The Final Proposed Rule amends the Board's existing rule in three major respects:

1. Scope. The Final Proposal requires pole-owners to permit attachment by CLECs, as well as incumbent local exchange carriers ("ILECs") and electric utilities that are unable to reach voluntary agreements with pole owners.

2. Procedures. The Final Proposal contains procedural schedules to prevent undue delay by pole-owning utilities in making attachments available. Flexible schedules are used to protect pole-owning utilities from being overwhelmed by extensive requests for make-ready.

3. Rates. The effects of this change will in most cases reduce revenues to pole-owning utilities, usually by less than one-tenth of one per cent of annual revenue and all

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1. Not all states provide cable with the right to condemn rights of way.
2. 47 U.S.C. § 224.

known cases by less than one-half of one percent of revenue.[3] Also, the rate for CLEC attachment will be twice that of cable TV attachments, and thus will be more in line with prevailing ILEC attachment rates in Vermont. Cable television companies will see a corresponding reduction in costs, which they may use to reduce costs to customers or to enhance services, and must reflect in charges for extending cable service to unserved rural areas.[4]

The Final Proposal maintains the same basic rate structure as the Board's 1984 rule, but makes some adjustments. This results in part from different treatment of the "safety space" and in part from different presumptions about average pole height.

III. Detailed Discussion of Comments Received

A. Overall Strategy

1. Delay

Several parties have urged that the Board do nothing, or at least delay adoption of any new rule, until after full consideration of a new contested evidentiary proceeding. However, this would considerably delay relief in at least two ways:

- Make-ready work by pole owners is a source of great frustration to many attaching entities.
- ILECs and CLECs have no clear method to obtain access to poles or to have a rate set when they cannot obtain a voluntary agreement.

The question of the proper rates for pole attachments has been under examination by the Board, in one form or another, for several years, and a final decision is needed.

2. Revocation of Existing Rule

Some commenters suggested that the Board should revoke its existing rule and allow Vermont operators to rely upon the FCC's pole attachment rule.[5] The Board considered this option seriously, particularly since the financial differences are small between the Final Proposed Rule and the FCC rules. However, the FCC rule does not apply to attachments to poles owned by municipal or cooperative utilities. Further, the Board has concluded that there is a need for a Vermont rule on some points that are not covered by federal law.

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3. Not all utilities provided information on this point.

4. Pursuant to PSB Rule 8.313 and PSB Docket No. 6101, Order 4/20/2000 at pp 109–120 and Order of 7/19/2000 at 16–18.

5. E.g., Verizon Comments of 5/7/01 at 5.

A Vermont rule will provide several non-financial benefits. First, it will create a substantive right to attach for an ILEC seeking an attachment to a power pole. In Vermont one telephone company found itself without an attachment contract and without any clear right to obtain attachments. Also, the Vermont rule will provide detailed timetables for make-ready work. Long delays in make-ready work by prior attachees has been a recurring complaint of cable TV companies and CLECs.

The Board has also concluded that the Vermont rule should include a Vermont-specific method for calculating pole attachment rates. One result will be the filing of pole attachment tariffs by pole-owning utilities, and this will allow potential attachers to estimate their costs more easily. The FCC does not require any advance notice of rates. Second, a Vermont rate formula will facilitate local resolution of pole attachment disputes. Under the FCC's rule, a pole owner or attacher seeking a rate must bring a proceeding before the FCC itself. Under the Final Proposed Rule, disputes are brought to the Board, if they have not first been mediated by the Department of Public Service. Third, having a Vermont rule relieves both pole owners and attachers of any concern that changing FCC rules or a changing mood in Congress may affect attachment rates.

Finally, the Board has limited the effect of the formula in the Final Proposed Rule by not applying it to existing pole maintenance agreements between ILECs and power companies. For example, neither the joint ownership agreement between Green Mountain Power Corporation ("GMP") and Verizon-Vermont, nor the joint use agreement between Central Vermont Public Service ("CVPS") and Verizon-Vermont would be displaced by the Final Proposed Rule.

3. Convening Technical Workshops

One utility suggested discontinuing the present rulemaking and convening a technical workshop run by a facilitator.[6] The Board declines to pursue this step, primarily because the issue of pole attachments has been under consideration for so many years already. The current process began in 1994 as a docket (including technical workshops), and then was converted into a rulemaking proceeding. To re-establish a docket would be to go backwards. Moreover, since the pole attachment rates and procedures are of general applicability and future effect, rulemaking is a desirable method.

6. Citizens Utilities Comments of 5/7/01 at 1.

B. Pricing

1. Rate Methodologies

The most controversial issue in this rulemaking has been the proper rate for a pole attachment by a CLEC or cable TV company. The parties have disagreed in fundamental ways. Pole-owning utilities, especially electric utilities, opposed reduction of the attachment fees, and even supported increases.[7] Some have even argued that the existing rule creates a "preferential rate"[8] or an "unfair subsidy [9]" from the ratepayers of pole-owning utilities to attaching entities such as cable TV companies.

a. Range of Solutions

While the issue is quite technical in some ways, the Board recognizes that at bottom there is no single right solution or "objective" best answer. Setting pole attachment rates requires allocating the costs of facilities that are used in common by two or more utilities. This is but an application of the general problem that there is no single universally accepted way to allocate common costs.

There are broad limits to economically sound rates. Economically, the Board should not establish any rate that creates a "subsidy" to or from a pole owner or an attacher. A subsidy exists when one contributor to a common good pays such a high price that another party can then pay less than its incremental cost. Incremental cost for an attacher is the extra cost imposed by its own attachment, assuming that the pole is already in place.

Thus it would be economically improper for a Board rule to require a pole owner to either subsidize a new attacher or vice-versa. However, there is a very wide range of possible rates *between* these extremes. While all of these possible rates are economically valid, some are more or less attractive for other policy reasons.

For pole attachments, the highest plausible rate probably results from dividing costs equally among all attachers. Even this high rate would not subsidize the pole owner, since it leaves the pole owner paying one-third of total cost, which is certainly higher than the incremental cost of attaching the pole owner's facilities to an existing pole.

A method producing a high attachment rate may seem appealing when one considers that the right-of-way across private and public property is the most legally significant — and in some cases economically valuable — aspect of a pole attachment. Since all attaching utilities have an equal right to cross that public and private property, one might suppose it fair to divide costs

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7. GMP Comments of 5/4/01 at 1; WEC Comments of 5/4/01 at 2.
8. GMP Comments of 5/4/01 at 1.
9. Citizens Utilities Comments of 5/7/01 at 1.

equally. This method has some historic basis in Vermont. Years ago, most poles had attachments only from electric and telephone utilities. When left to their own devices, these two utilities typically decided to share more or less equally the cost of installing and maintaining poles.

A method that produces a high attachment fee also is appealing if one accepts that pole-owning utilities are installing taller poles, and incurring greater costs, solely to accommodate additional attachments.[10] To the extent that pole-owning utilities are anticipating future attachments, they may be installing longer poles now, and incurring extra costs now for longer poles, deeper settings and increased labor.[11]

At the other extreme, one might require the new attaching utility to pay only the incremental cost of its own attachment. Generally, while such rates are very low, as discussed above they would not create a subsidy. Indeed, this is the lower limit. Any rate below incremental cost would impose additional cost on the pole owner and thus would create a subsidy.

The incremental method in particular has some precedent. Congress established "additional cost" as the lowest limit for possible rates to be paid by cable TV providers in states that have not pre-empted the FCC.[12]

A method producing a low attachment rate may seem appealing if one accepts that existing pole owners (or at least electric utility pole owners) must keep their wires a minimum distance off the ground to ensure the safety of their high voltage (typically 7 or 20 kilovolt) distribution lines. Therefore, even if there were no other attachers, electric utilities would still in some cases have poles of about the same length as now.[13] If the electric utility has already placed a long pole for its own reasons, it can charge a very low rate to a cable TV attacher and still draw some contribution toward pole costs.

b. The Final Proposed Rule Formula

The Board's existing rule, adopted in 1984, applied only to cable TV attachers. It took a middle course economically, adopting rates somewhat higher than incremental cost. The rule provides that costs are allocated to a cable TV attacher based upon the percentage of "usable" space the attacher occupies. Some of the "available" space on a pole often is unoccupied, and this reduces payments by attachers and increases the responsibility of pole owners. The results for cable TV

10. 14 Municipals' Comments of 5/7/01 at 1 (electric utilities typically installing poles that are 5 or 10 feet longer to accommodate additional attachers).

11. 14 Municipals' Comments of 5/7/01 at 1–2.

12. 47 U.S.C. § 224(d)(1).

13. One Vermont utility has reported that it has installed 40-foot poles in order to safely upgrade the voltage on its distribution system. A 40-foot pole has a large amount of attachable space, probably about 16 feet.

companies is a rate that is typically 1/10 to 1/15 of the cost of the pole. This existing Vermont rule was and is similar to the rule established by the FCC in some other states for cable TV attachers.

The Final Proposed Rule here preserves the basic methodology of the 1984 rule, and it still relies upon the percentage of the total *usable* space that is used by an attachment. The Board thus continues to follow the FCC's basic reasoning and methodology for cable-TV attachments.[14] Some modifications, discussed below, are adopted because they seem consistent with unique Vermont facts or policy. This is in part because the FCC's pole attachment rules and orders were issued after a detailed rulemaking process involving many comments from all portions of the affected industries. Also, by following the federal rule, Vermont can take advantage of decisions of the FCC and of other state commissions regarding the meaning of words and phrases used in the Vermont rule.

Under the Final Proposed Rule, cable television companies in many cases will pay approximately 1/16 of the cost of a pole. This is a slight decrease in most cases from the payments cable TV companies now make to pole owners. While the rates charged by cable TV companies are not regulated, the Board does expect that consumers will benefit from this lower price. The Board expects that any cost reductions resulting from this rule change will be reflected in the calculations that cable TV companies make in defining their line extensions. Cable TV companies generally are required by Vermont law to build in all areas where it is economically feasible, rather than the obligation to serve imposed upon public utilities.[15] Thus, a reduction in pole attachment costs to cable companies should lead to cable services becoming available in some additional low-density rural areas. The current expectation for Adelphia Cable, for instance, is for extensions to be built where there are 14 homes per mile, based upon a formula that includes the costs of construction and carrying costs, including attachment costs. A reduction in attachment costs will lead to a revision of the formula values, so as to require extension of cable services to less densely populated areas. This will create even more value for Vermonters as cable TV companies are increasingly offering high-speed Internet service to new customers.[16]

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14. 47 U.S.C. § 224 (d) defines a "just and reasonable [pole attachment] rate" for cable television providers as not more than the percentage of usable space occupied by the attachment times the sum of operating expenses plus capital cost of pole. That subsection also defines "usable space" as space that can be used for attachment of wires, cables, and associated equipment.

15. See Board Rule 8.313 and Order of April 28, 2000, in Docket 6101 at pages 109–120.

16. Also, the technology for cable TV companies to offer local exchange service is nearly mature, and some cable TV companies are today offering their customers both cable and telephone services.

Electric utilities generally opposed a low rate for CLECs, particularly since they anticipate many more CLEC connections in the future.[17] The Board was also concerned about establishing a rate that would charge CLECs substantially less than ILECs for cable attachments. Under the Final Proposed Rule, CLECs will not pay the same rate as cable TV companies. The rule assumes that CLECs occupy two feet of pole space, rather than the one foot occupied by cable TV. This produces a rate for CLECs that pays approximately 1/8 of the cost of a pole. This is similar to the rate that would apply if the FCC rule for CLECs were used,[18] but the formula in the Board's rule does not depend upon the number of attachments by other utilities.

The Board has adopted this policy primarily because it believes CLECs should be charged a rate that is closer to that paid by ILECs.[19] This is consistent with competitive neutrality. Moreover, while it is a price higher than that paid by cable TV, the Board does not believe that the cost of pole rental is a significant barrier to CLEC entry in Vermont. Therefore, setting a rate that is higher than the rate for cable TV should not significantly deter CLEC entry, although the procedural provisions of the rule, by enhancing the ability of CLECs to obtain timely attachments, should encourage entry. Because of the small number of CLEC attachments at present, any difference between the FCC rule and the Vermont Final Proposed Rule will have only a small immediate effect on pole-owners.

The Board recognizes that the Final Proposed Rule will increase the attachment rates charged to a cable TV company if that company begins to provide local exchange service.

c. Alternatives Considered

The Board has also considered several alternative costing methodologies. The first option considered was noted above, to divide costs equally among all pole attachers. This method would substantially increase the current attachment rates for cable TV. This option was rejected both because it might impair the extension of cable TV service into unserved rural areas and because it might set CLEC attachment rates so high as to impair the development of local exchange competition.

Equal-division is approximately the method by which Verizon-Vermont and the state's major electric utilities have chosen to allocate costs on existing poles. The Final Proposed Rule does not disturb such agreements. However, there are important differences between these contracts and the rights of attachers under this rule. The contract between CVPS and Verizon, and the contract between Green Mountain Power and Verizon, give the contracting parties greater rights

17. GMP Comments of 5/4/01 at 2.

18. See the charts on page 18 for a comparison of present rates with rates under the FCC CLEC methodology.

19. ILECs in many cases pay approximately ½ of the cost of the pole.

to demand action from the other party than is generally available to proposed attachers under this rule.

A second option considered was to set rates at the incremental cost actually caused by the pole attachment. This method, also discussed above, would reduce current attachment rates for cable TV providers. This method was rejected because the incremental construction costs of creating a new attachment are already paid by the attacher under the "make-ready" portion of the rule. With construction costs covered, the ongoing incremental costs would be low, or even negligible in some cases. The Board has rejected this option because it has concluded that cable TV companies and CLECs should make at least some contribution to common costs. In other words, the fact that a cable TV company or CLEC has attached to an existing pole should provide at least some benefit to the ratepayers of the pole-owning utility. Giving an essentially "free ride" to late attachers would not be fair to pole owners, and might deter utilities from installing and owning new poles.

Another option that the Board considered was to adopt the FCC's rate method for CLEC attachments.[20] This new formula, now being phased in by the FCC over several years,[21] takes different approaches to the usable and unusable portions of the pole. Costs associated with the usable portion of the pole are allocated by the percentage of usable space occupied. A different formula is used for the "unusable" portion of the pole (the portions below ground or below the minimum attachment height). That formula requires attachers to pay a rate equal to two-thirds of the attacher's pro-rata share of costs. Use of the FCC's CLEC formula drew mixed reviews from commenters.[22]

With one further modification, the FCC's CLEC methodology was distributed (as "Alternative One") for comment by the participants in the rulemaking. The additional modification was to apply the new method only to poles newly installed after June 30, 2001. This option drew some support.[23] Other commenters were opposed, for a variety of reasons. Specific objections included that different rules would apply to new and old poles, that the plan would create a heavy administrative burden, and that the plan arbitrarily uses a two-thirds factor.[24] The Board has rejected this approach, largely because it drew only limited support. However as noted above,

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20. These FCC rates apply only in states that have not preempted FCC ratemaking.

21. As required by 47 U.S.C. § 224, in states where FCC rates apply, FCC rates for CLECs began to increase on February 8, 2001.

22. Verizon Comments of 5/7/01 at 7 (favorable); DPS Comments of 5/3/01 at 2 (unfavorable).

23. CVPS Comments of 5/4/01 at 1 (although alternative is difficult to administer, it is fairer overall than other alternatives); 14 Municipals' Comments of 5/7/01 at 4 (prefers part "B" where rates for unusable portion of pole are set at 2/3 of equal division rate).

24. DPS Comments of 5/3/01 at 1; GMP Comments of 5/4/01 at 6; NECTA Comments of 5/4/01 at 3; Verizon Comments of 5/7/01 at 7; *see also*, WEC Comments of 5/4/01 at 3.

the method that the Board has adopted for CLECs produces a financial result similar to that of the FCC's rule for CLECs.

The Board also considered dividing costs based upon the proportions of all space *used* on the pole rather than proportion of *usable* space. This methodology was distributed (as "Alternative Two") for comment by the participants in the rulemaking. It did not draw support from any party.[25] A disadvantage of this approach is that it makes each attacher's rent depend on the number of other attachers on the pole. It may also create excessive record-keeping requirements.[26] The Board has rejected this alternative because it did not receive any support from commenters.

d. Other Considerations

The Board also considered comparability to pole attachment rates in other states. According to a review conducted by the Florida Public Service Commission, Vermont's rates for cable attachments are substantially above the national average. A map of the United States from that study (appended to this paper) compares rates charged in all the states. It shows that rates in a few states are higher than Vermont,[27] but Vermont's rates are actually significantly higher than the Florida study reported.[28] This information strengthens the Board's conclusion that pole attachment rates for cable TV in Vermont should be reduced, or at least not increased.

The Final Proposal will reduce revenues of pole-owning utilities at the same time that it will reduce the cost of cable television companies. However, the overall economic impact will be very small in relation to total company revenues. For example, GMP anticipates a revenue loss of $59,100.[29] This amounts to only 0.03 % of the company's total revenues. For CVPS, it seems unlikely that the effect would exceed 0.10%.[30] For Washington Electric Cooperative, the

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25. E.g., 14 Municipals' Comments of 5/7/01 at 4; CVPS Comments of 5/4/01 at 1; DPS Comments of 5/3/01 at 1-2; GMP Comments of 5/4/01 at 6; NECTA Comments of 5/4/01 at 3; Verizon Comments of 5/7/01 at 7; WEC Comments of 5/4/01 at 3.

26. Verizon Comments of 5/7/01 at 7.

27. Proposed rates in some portions of Long Island, New York, are reportedly $18 per year per pole for copper attachments, $36 per year per pole for fiber optic cable and $45 per year per pole for certain other attachments. BED Comments of 5/7/01 at 2.

28. Vermont's actual average pole attachment rate is approximately $12.00. Due to an error in the report's data entry method, Vermont is shown in the map with rates substantially below this level. The error arose from the arrangements in Vermont for joint use and joint ownership of poles. These arrangements are unusual, possibly unique. The data collection methodology overlooked that fact and thus underestimated the payments from cable television companies to Vermont pole owners. Nevertheless, we have no reason to believe that the data from other states suffers from this error, and we believe the data reported for other states to be reliable.

29. GMP Comments of 5/4/01 at 1.

30. This is based primarily on the fact that CVPS's total revenue from cable television pole rental is approximately $552,000, or only 0.2% of total revenues.

revenue loss from the rule will be approximately 0.10% of revenue.[31] Thus, the Board does not believe this rule change will have a significant rate effect on ratepayers of pole-owning utilities nor any material adverse effect on the stability of the state's electric utilities.

Some parties commented that cable television or competitive telephone services ought to pay a larger share of pole costs because electric and basic telephone service are more important than cable television services, or have a greater intrinsic value.[32] Another party commented that cable companies, like Adelphia, are for-profit companies, while numerous electric utilities in Vermont are municipal or cooperative utilities.[33] Historically, one of the Board's guiding principles is that the customers who cause costs should bear those costs. The Board historically has not set rates based upon the inherent value of a service or product to the user. In addition, the Board does not want to base policy upon the relative worth or value of different utilities. Such a practice, if adopted, would be increasingly difficult to maintain as the technologies for cable TV and telecommunications grow closer. It is even possible that electric companies may at some point use their poles to provide telecommunications and cable TV.

2. Pole Height

The Final Proposed Rule obligates each pole owner to calculate attachment rates based upon the average height of its poles, or to accept a number set in the rule. The Final Proposed Rule establishes a presumption that poles are 40 feet long, and thus have 16 feet of usable space. Some commenters suggested that a smaller number is more representative of Vermont poles. Verizon, for example, reports that its poles average 36.6 feet.[34] Others assert that utilities are installing taller poles to accommodate additional attachers.[35] Under the Final Proposed Rule, such pole-owning utilities may conduct pole studies, and they will be able to file tariffs supporting higher rates than are possible with the 40-foot presumption.

The Board has adopted the 40-foot number for two reasons. First, it encourages pole-owning utilities to conduct studies on their actual pole lengths, since a utility with shorter poles can increase its rental receipts by conducting a study. This is an appropriate burden for a pole-owning utility because, as compared to an Attaching Entity, it has much greater capacity to collect the necessary data. Attachers cannot fairly be expected to produce or to challenge such information that applies across the entire territory of a pole-owning utility. Second, the 40-foot

31. WEC Comments of 5/4/01 at 3.
32. WEC Comments of 9/29/00 at 2.
33. BED Comments of 5/7/01 at 2.
34. Verizon Comments of 5/7/01 at 6–7.
35. 14 Municipals' Comments of 5/7/01 at 1.

figure is not unrealistic. More and more 40-foot poles are being installed.[36] Partly this is because some electric utilities are building their distribution systems to operate at 33 kilovolts, and to maintain safety, such systems require taller poles.

3. 40-inch Safety Space

A major issue in this rulemaking has been the treatment of the "safety space." This is a 40-inch space between the lowest energized electric facility and the highest communications facility. The Board's existing rule provides that the safety space is not part of usable space on the pole. Thus the safety space is treated in the same manner as the underground portion of the pole. The effect is to reduce "usable space" and thus to increase pole attachment rates. Electric utilities support the existing rule, arguing that the safety space "exists for the benefit and protection of the employees of attaching utilities.[37]

The Final Proposed Rule changes the status quo. It provides that the 40-inch safety space is included as usable space, and thus it is essentially assumed to be in use by the pole owner. The new rule follows the longstanding FCC rule.[38] The Board has decided to make this change largely for the reasons given by the FCC.

> It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers. The space is usable and is used by the electric utilities. A bare pole, when erected has portions to which attachments cannot be made at any time-the ground clearance and the part of the pole below ground. The rest is available for attachments; it is usable space. A communications attachment, even though it may be a fiber optic cable with a diameter of only one inch, is presumed to occupy one foot of the attachable space because of separation requirements. In a like manner, the electric supply cable on the pole, because of its unique spacing requirements must be 40-inches away from communications attachments. No one questions that the eleven inches of space not physically occupied by a fiber optic cable, but attributed to it, is usable space. Because the electric supply cable precludes other attachments from occupying the safety space, which would otherwise be usable space, the safety space is effectively usable space occupied by the supply cable. So long as their crews make the installation, the electric utilities are not limited by the NESC in what

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36. BED for instance, has indicated that its average pole height is 40 feet.

37. BED Comments at 1.

38. The Board rejects BED's argument that this violates 47 U.S.C. § 224(d). See BED Comments at 1. First, of course section 224 does not limit the rates set here. Second, even assuming, *arguendo*, that section 224(d) does define "usable space" in a manner that excludes the neutral space, that same section also uses the term in a formula that defines the *maximum* allowable rate chargeable for cable TV attachments. If "usable space" were defined by the FCC as BED suggests it ought to be, it would produce a smaller quantity for usable space and thus would produce a higher pole attachment rate. A rate lower than the maximum does not violate the statute.

> equipment or cables they may attach in the safety space. Accordingly, we reject the electric utilities' arguments to reduce the presumptive usable space of 13.5 feet by 40-inches.[39]

Also, Vermont electric utilities do in fact often use the safety space for grounded equipment. This includes transformers and streetlights.

4. Application to Joint Ownership and Joint Use Arrangements

Several parties commented that an earlier draft of the rule would substantially reduce revenues of existing electric companies. The Final Proposed Rule clearly states that the pricing formula does not displace existing contractual arrangements. Based upon its review of the joint arrangements among Verizon-Vermont and GMP and CVPS, the Board anticipates that the great majority of existing poles currently in joint ownership or joint use will retain that character. Therefore, the great majority of existing poles will continue to be priced at current rates even if new (future) poles are subject to separate regulatory regimes. Moreover, while future contracts for pole maintenance must be filed at the Board and approved by the Board, pricing in those contracts may be established largely in accordance with the desires of the parties.

The Final Proposed Rule does not provide a specific formula for calculation of pole attachment rates for electric utilities or for incumbent local exchange telephone companies. In most cases, these rates are set by bilateral agreements. If the parties are unable to reach agreement, the Final Proposed Rule provides that the Board may consider the terms and conditions of any previous attachment or joint-use contracts between the parties in setting a rate not inconsistent with the principles of this Rule.

An early draft of the rule provided that when ownership of a pole is shared, or when a pole is subject to a joint maintenance agreement, revenue from pole attachments will be shared. One party commented that the provision might be overbroad.[40] That provision has been stricken as requested. The Board assumes that where two utilities have a contract for joint maintenance and use of poles, the pole owner will file the tariff for attachments and will, unless otherwise provided in the contract, retain all of the revenues.

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39. *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order Adopted March 29, 2000, FCC 00-116 at ¶ 22.

40. GMP Comments of 5/4/01 at 5.

5. Gross and Net Cost

An earlier version of the rule applied a mixture of terminology to the method for calculating pole cost. Commenting parties found this confusing, even contradictory.[41] The Board has concluded that the best resolution is to mirror, for the present, the FCC method of calculating pole cost.

Electric utilities generally wanted rates to be based upon gross pole cost.[42] Cable TV companies, by contrast, wanted rates to be based upon net cost, in which depreciation of poles reduces net investment and thus produces a lower attachment rate.[43] The Final Proposed Rule uses net cost, a decision that is consistent with the current FCC rule. Net cost takes account of depreciation as well as deferred income taxes. The Board believes that pole attachment rates are more appropriately based upon the pole-owning utility's current rate base, just as are the pole-owning utility's retail rates. Gross pole investment, unadjusted for depreciation, would result in unfairly high attachment rates.

For the details of calculating net pole cost and carrying charges, the Board intends to follow the methodology prescribed by the FCC's rule. This methodology is readily available and uses publicly available financial data from the utilities. These requirements are not included in the rule itself for two reasons. First, the rules are highly technical and complex in nature, and would needlessly clutter the rule. The main reason, however, is that the existing process of calculating net pole cost is dependent upon filings at federal agencies and thereby on the rules of those federal agencies. If those underlying requirements should change, the current procedure could become obsolete. By leaving the detailed methodology out of the rule, the Board is avoiding an incorporation by reference that could produce unpredictable results in the future. If federal procedures change, the Board can alter the methodology, but will not have to go through the time consuming and expensive process of altering this rule.

C. Make-ready Work

There have long been complaints about the length of time taken by make-ready work. Generally, pole-owning utilities argued for longer periods to complete their make-ready work.[44] Cable TV companies and the DPS argued for the opposite.[45] The Board has set deadlines that it believes can be achieved by pole-owning utilities. For example, for a medium-sized project, the Final Proposed Rule requires completion of a make-ready survey in 90 days and completion of the

41. CVPS Comments of 5/4/01 at 1.
42. CVPS Comments of 5/4/01 at 1.
43. NECTA Comments of 5/4/01 at 2.
44. CVPS Comments of 5/4/01 at 2 (seeking 90 days for makeready surveys).
45. NECTA Comments of 5/4/01 at 2 (opposes any response period to attachment application in excess of 90 days); DPS Comments of 1/19/00.

make-ready work on the poles themselves within 180 days. This is not inconsistent with schedules suggested by some commenters, but in some cases may require more expeditious work by pole-owning utilities.

Work deadlines for large pole attachment projects were particularly controversial. Pole owners noted that some requests for make-ready have involved thousands of poles. The Final Proposed Rule provides two sliding scales for make-ready work. Different deadlines are established for small, medium, and large jobs.[46] One three-part schedule applies to make-ready surveys and another three-part schedule applies to completion of make-ready work. For the largest jobs, the deadlines are flexible, but the pole-owner must negotiate in good faith,[47] and a utility seeking an attachment can file a complaint at the Board.[48] Although at least one utility disagrees,[49] the Board believes that the deadlines in the Final Proposed Rule are reasonable and can be achieved by pole-owning utilities with reasonable effort.

Almost all utility poles have more than one existing attachment. Make-ready work generally is begun by the highest attacher and proceeds down the pole. Commenters disagreed as to whether deadlines for make-ready work for a new attachment should apply separately to each existing attacher or cumulatively to the pole itself, thereby binding all existing attachers within a single deadline. Cable TV companies generally recommended a single deadline for each pole.[50] Pole owners generally wanted time periods to apply separately and sequentially to each attacher.[51] The Final Proposed Rule establishes a single deadline for each requested pole attachment, but it allows pole-owning utilities to extend these deadlines when there are events beyond the control of the pole-owning utility.

Some attachment projects involve a large proportion of the pole-owning utility's poles. Verizon-Vermont commented that no attacher should be able to submit an application for more than 200 poles at one time, nor more than 2,000 poles cumulatively. Verizon reports that it currently has such provisions in a tariff and in an agreement with the New England Cable Television Association[52] The Board declined to change the Final Proposed Rule because the sliding scales adopted for the makeready periods will ameliorate any problems, and because such limits would form a barrier to entry by new entrants. The Board believes that pole-owning utilities, as users of

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46. Job size categories in the rule are expressed as a percentage of the utility's overall number of poles.
47. This requirement was suggested by NECTA. NECTA Comments of 5/4/01 at 2.
48. Rule § 3.710; *see* DPS Comments of 5/3/01 at 2.
49. Verizon commented that even 120 days is insufficient to complete make-ready work for attachments to as few as 1% of its poles. Verizon Comments of 5/7/01 at 1.
50. NECTA Comments of 5/4/01 at 3.
51. Verizon Comments of 5/7/01 at 3.
52. Verizon Comments of 5/7/01 at 1–2.

the public right of way, have an obligation to exercise reasonable efforts to share that right of way with other utilities.

Verizon-Vermont generally wishes to keep its own pole attachments at the lowest actual attachment point on the pole.[53] To accomplish this, Verizon and other telephone companies must sometimes lower their own cables to allow room for a new attacher. The commenters disagreed about how these costs should be paid.[54] The Final Proposed Rule provides that under these circumstances the costs of lowering the existing lowest attachment will be divided equally between the new attacher and the existing attacher (usually a telephone company). The Board has concluded that before these circumstances can arise, the existing attacher must have originally placed its own facilities higher than is required by safety codes. Accordingly, the original attacher should share in the cost of freeing up space for the new attacher. Likewise, the new attacher is a cause of the relocation, and should pay a portion of that cost. To omit this provision would give telephone companies the right to impose additional and unnecessary costs on new attachers simply by setting their attachments high on new poles.

Customarily, the ILEC has been the lowest attacher on a multi-use pole. This is the result of the weight of telephone copper cables and their elasticity. Nothing in the rule requires or suggests a change to this custom.[55]

Two commenters noted that an early draft of the rule could be read to shift to the pole owner the responsibility of obtaining state or local permits. These parties asserted that permits are properly the responsibility of the applicant for attachment.[56] The Board agrees. The Final Proposed Rule makes clear that the pole owner's sole responsibility is to cooperate in good faith in the unlikely event that the permitting authority requires the pole owner's participation.

"Overlashing" is the use of an existing attachment for a second wire or cable. An earlier draft of the rule had proposed that overlashing of existing attachments might commence on one day's notice to the pole owner. One commenter asked for 30 days.[57] The Final Proposed Rule requires 10 days' notice.

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53. Verizon Comments of 5/7/01 at 4.

54. E.g., DPS Comments of 5/3/01 at 3 (100% on existing attacher); Verizon Comments of 5/7/01 at 4 (100% on new attacher); NECTA Comments of 5/4/01 at 3 (50-50 is reasonable).

55. Verizon made a specific comment relating the circumstance where it is not the lowest attacher; a proposed new attachment causes replacement of an existing pole; and Verizon must visit the work site twice, the second time to remove the pole. Verizon commented that there can be additional make-ready costs under these circumstances that Verizon should not be required to share. Verizon Comments of 5/7/01 at 4–5. However, nothing in the rule requires Verizon to allow attachment by another utility below Verizon's facilities. Therefore no change to the rule is needed.

56. E.g., GMP Comments of 5/4/01 at 4; CVPS Comments of 5/4/01 at 2.

57. GMP Comments of 5/4/01 at 5.

D. Outside Contractors

Pole owners have commented that only their own engineers may perform the inspection of the existing plant to prepare a make-ready work plan, and that only their own workers may perform any work on their plant. However, utility workers are not always available, and utilities routinely use contractors for various tasks, including make-ready work. The Final Proposed Rule assumes that use of utility personnel is desirable, but that attachment cannot be indefinitely delayed because utility personnel are not available for long periods of time. Thus it provides that when an applicant seeks a pole attachment, and the pole-owning utility cannot complete its make-ready work in a timely manner, the applicant may demand that the pole owner use an outside contractor. The pole-owning utility then must exercise best efforts to find and use an outside contractor. It is not the intent of the Final Proposed Rule to circumvent the existing practices of the pole owner, but to allow routine make-ready jobs to be performed in a timely manner even when utility personnel are not available.

Commenters objected that an earlier draft of the rule might lead to inadequate supervision.[58] The Final Proposed Rule has been modified to make clear that work is to be done under the control of the utility.

Comments noted that union work rules would make the use of outside contractors very expensive for the utility. This would be an unfortunate result, and the Board is willing to be responsive if this concern materializes. However, the added cost would be only one factor to be considered. Opposed to this is the benefit that allows Vermonters to receive utility and other services promptly.

E. Space-saving Techniques

The Board received comments that, although a pole owner may use such space-saving techniques (such as Hendrix-type holders, side-arm extenders, and boxing of poles) for its own purposes, these techniques are considered out-of-bounds when a cable system wishes to attach. The Final Proposed Rule provides that, if a utility uses these techniques *for its own purposes*, it must be willing to consider using them for the benefit of attachers also. The Board is not aware of any basis to allow these practices for one purpose but not for another.

F. Attachments by Electric Companies and ILECs

The federal statute and rules do not provide for attachments by electric utilities or by ILECs. Electric companies are outside the scope of the Communications Act. The ILECs were

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58. As originally written, the rule might have allowed a cable operator's contractors to perform work upon electric or telephone utility plant.

intentionally left out of the mandatory-access and regulated-rate protections of the federal Telecommunications Act of 1996. The Board is not bound by either of these limitations, and the Final Proposed Rule creates a right of attachment in both cases.[59]

G. Minor Issues and Errata

In addition to the specific comments addressed above, the Board has also received and incorporated numerous comments upon minor technical issues, and drafting errors, and inconsistencies. While these comments were helpful they did not require substantial changes to the Final Proposed Rule, and they are not specifically identified here.

H. Conclusion

The question of pole attachment rates has been under examination, in one form or another, for several years, and in several proceedings. In the current rulemaking proceeding, a final proposed rule was submitted, and now a second final proposal is submitted here. In the interim, the Board has met with interested parties, has circulated alternative drafts for comment, and has had several deliberations. The Board has carefully considered the written and oral comments of the parties, given in several rounds. These comments were extremely useful and had a major impact on the form of the Final Proposed Rule. It is regrettable that so many of them were received near the end of the process rather than earlier in it.

It is time to reach a conclusion on the question of pole attachments. Unfortunately, there is no single right answer for how to allocate common costs, and the affected parties remain widely separated. Nevertheless, the Board submits that the Final Proposed Rule filed here is within the Board's authority, is consistent with legislative intent, and is neither arbitrary nor capricious. The Board urges the Legislative Committee on Administrative Rules to approve the Final Proposal.

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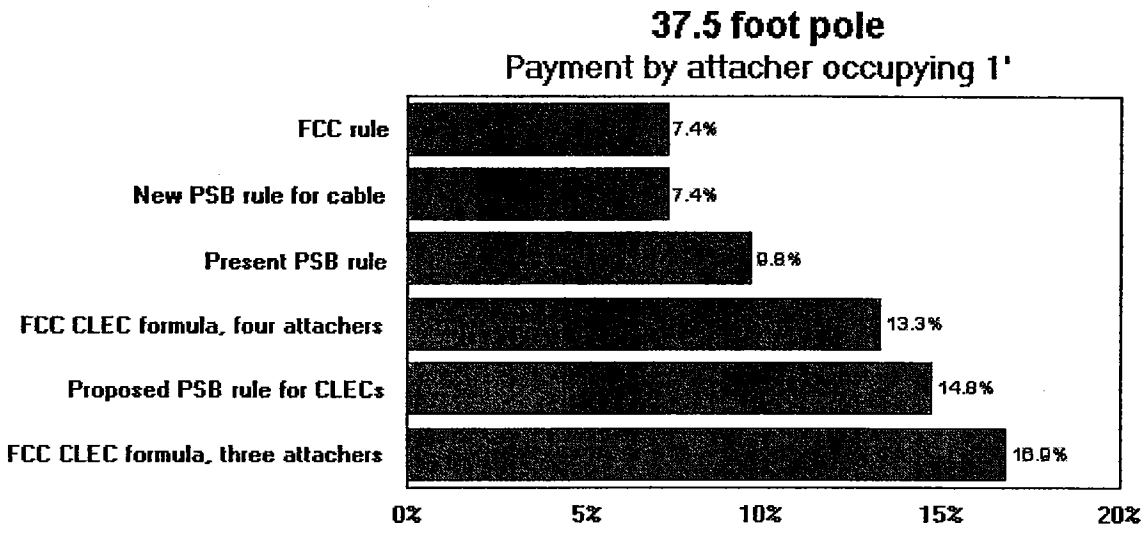
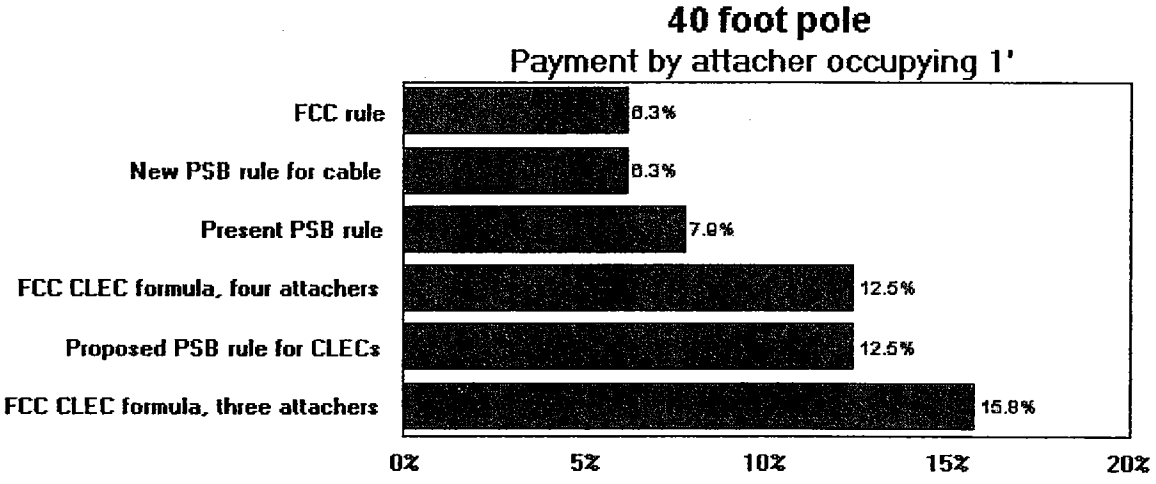
59. The Board has recently had before it a dispute between Champlain Valley Telecom and Northland Telecom v. GMP and VEC in which the Board was asked to set rates for ILEC attachments to electricity utility poles. However, that case has been settled pending the outcome of this rulemaking proceeding.

CHARTS


37.5 foot pole
Payment by attacher occupying 1'
FCC rule
New PSB rule for cable
Present PSB rule
FCC CLEC formula, four attachers
Proposed PSB rule for CLECs
FCC CLEC formula, three attachers
7.4%
7.4%
9.8%
13.3%
14.8%
18.9%
0%
5%
10%
15%
20%


40 foot pole
Payment by attacher occupying 1'
FCC rule
New PSB rule for cable
Present PSB rule
FCC CLEC formula, four attachers
Proposed PSB rule for CLECs
FCC CLEC formula, three attachers
6.3%
6.3%
7.9%
12.5%
12.5%
15.8%
0%
5%
10%
15%
20%