EFFECT OF THE TELECOMMUNICATIONS ACT OF 1996 ON ACCESS TO ELECTRIC AND GAS UTILITIES' RIGHTS-OF-WAY

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The Telecommunications Act of 1996 (TA96) substantially expanded the authority of the Federal Communications Commission (FCC or the Commission) over local utilities, including local distribution companies, by establishing broad rights of access to utility rights-of-way, subject to non-discriminatory terms and conditions and rates and charges.[1] The new pole attachment rules became effective on February 8, 2001.[2] The substantial competition that has characterized telecommunications services and the difficult financial times telecommunications service providers are currently experiencing are likely to be the foundation for disputes between telecommunications companies and utilities over access, structural arrangements already in place or contemplated, and the perception of preferences provided by utilities to certain attaching entities.

This article examines how the new pole attachment requirements and the FCC's or states' interpretation of those rules may affect utilities. Specifically, this article: (i) discusses the objectives and requirements of TA96; (ii) reviews the new pole attachment provisions; (iii) discusses how the pole attachment rules have been interpreted and may affect utilities; (iv) examines the FCC's formulas for pole attachment charges, as well as how the states' formulas may differ from those of the FCC; and (v) poses questions and concerns relating to the pole attachment rules as they continue to be interpreted by the FCC, the states, and the courts.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, § 703 (1996) (codified at 47 U.S.C. § 224).

2. 47 U.S.C. § 224(e)(4) (1999).

I. THE TELECOMMUNICATIONS ACT OF 1996

A. Overview

TA96, which became effective on February 8, 1996, was the most extensive re-write of our nation's telecommunications laws in the past sixty years. The promise of TA96 was the removal of legal and regulatory barriers to entry in telecommunications markets so that customers would be able to receive whatever packages of services they might demand. According to the Conference Report accompanying TA96, Congress intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[3]

One of the most significant objectives of TA96 was to open the local exchange telecommunications industry to competition. TA96 removed state and local barriers to entry by competitors of the incumbent local exchange carriers (ILECs), thereby eliminating the exclusive local exchange franchises granted by the states. Congress imposed general access and interconnection obligations on all local exchange carriers (LECs), and some additional obligations on the ILECs, to facilitate the entry of local exchange competitors pursuant to a strict timetable. TA96 left the particular terms and conditions of interconnection to "good faith" private party negotiations between the incumbents and competitors.

Recognizing that regulation of local exchange telephony has historically been under the control of state public service commissions, Congress gave the states a significant role in the development of local exchange competition. Congress provided that the state commissions would arbitrate unresolved issues if the parties reached an impasse. Congress further required that access and interconnection agreements, whether reached through negotiation or arbitration, be approved by the state commissions. Finally, Congress established the pricing standards that state commissions would apply in arbitration to ensure just and reasonable rates for interconnection, unbundled network elements, reciprocal compensation, and resold services. Congress made it clear that ILECs, which are required to make their networks and services available for use and resale by their competitors, would recover their actual costs of doing so, including a reasonable profit.

TA96 also contains a mechanism under which the regional Bell operating companies (RBOCs) may receive authorization to provide in-region interLATA services.[4] An RBOC may apply to the FCC for interLATA relief: (1) when it enters into state-approved access and interconnection agreements with one or more competing providers of telephone exchange service to residence and business customers either

3. S. CONF. REP. No. 104-230, at 1 (1996).
4. 47 U.S.C. § 271 (1999).

exclusively or predominantly over its own facilities; or (2) when it generally offers access and interconnection pursuant to a state-approved statement of general terms and conditions if no such provider has requested such access and interconnection.[5]

B. Focus on Access to Rights-of-Way

TA96 section 703 amended section 224 of the Communications Act of 1934.[6] As originally enacted in the 1978 Pole Attachment Act, section 224 was designed to assure that utility control over poles and rights-of-way did not stifle the growth of cable television. TA96 amended section 224 by extending its protections to telecommunications carriers as well as cable operators and by expanding coverage beyond electric utilities. Section 224 requires utilities to provide access to their rights-of-way by telecommunications carriers on non-discriminatory terms and conditions and subject to rates that are just and reasonable. Section 224 took effect on February 8, 2001, five years following the date of enactment of TA96.[7]

II. SECTION 224 REQUIREMENTS

As amended, section 224 sets forth the new pole attachment requirements and mandates a "utility . . . provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way" that it owns or controls.[8]

TA96 defines a "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."[9]

A "utility" is defined as "any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[10] "Utility" does not include any railroad, any cooperatives, or any federally or state-owned entity.[11]

A "telecommunications carrier" is defined as "*any* provider of telecommunications services, except that such term does not include aggregators."[12] "Telecommunications service" is then defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[13] "Telecommunications" means "the

5. 47 U.S.C. § 271(c) (1999).
6. *Id.* § 224.
7. 47 U.S.C § 224 (f)(1).
8. *Id.* § 224; 47 C.F.R. § 1.1403(a) (1999).
9. 47 U.S.C. § 224(a)(4) (1999) (emphasis added).
10. *Id.* § 224(a)(1); 47 C.F.R. § 1.1402(a) (1999).
11. 47 U.S.C. § 224(a)(1) (1999); 47 C.F.R. § 1.1402 (a) (1999).
12. 47 U.S.C. § 153(44) (1999) (emphasis added).
13. *Id.* § 153(46).

transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[14]

III. APPLICATION OF SECTION 224

As required by Congress, the FCC has implemented certain provisions of section 224 in several orders discussed below. In doing so, the FCC has interpreted certain provisions of the pole attachment rules that may affect which utilities are subject to the requirements, as well as to which carriers a utility must provide access to its poles. In addition, the FCC has recognized that it may not regulate pole attachments where a state has adopted its own pole attachment requirements.

A. *Utilities and Rights-of-Way Subject to the Pole Attachment Rules*

Section 224's definition of "utility" expressly refers to LECs and electric, gas, water, steam, or other public utilities. The FCC has interpreted the term "utility" to include ILECs, which requires them to open their systems to other carriers. Nevertheless, the FCC excluded ILECs from the category of telecommunications carrier, thereby depriving them of access to utilities' systems under TA96.[15]

Since the enactment of TA96, the Commission does not appear to have considered whether particular gas utilities qualify under the definition of "utility." Thus, section 224 may yet be found to apply to each of interstate pipelines, gathering companies, and Hinshaw pipelines if they own or control rights-of-way used for any wire communications.[16]

In implementing section 224, the FCC concluded that the use of *any* utility pole, duct, conduit, or rights-of-way for wire communications triggers access to *all* poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.[17] In a 1999 order, the FCC reaffirmed its conclusion that:

> [E]lectric transmission facilities are not exempted from the pole attachment provisions of section 224. We reject the argument that, because a transmission pole is not used by the utility for stringing communications wires, it would not fall within the access obligations of section 224(f)(1). . . .[W]e reaffirm our conclusion that use of *any* utility pole, duct, conduit, or right-of-way for wire communications

14. 47 U.S.C. § 153(43) (1999).

15. *Implementation of Section 703 (e) in the Telecommunications Act of 1996*, 13 F.C.C.R. 6,777, 6,781 (1998).

16. California has exempted certain utilities that otherwise would be included in this definition from these obligations. The California Public Utility Commission (PUC) has refused to apply its rules at the current time to other categories of investor-owned public utilities, such as gas, water, or steam utilities, but may consider expanding the scope of the rules at a later time to cover additional classes of utilities. *See generally California Pole Attachment Order, infra* note 39.

17. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 16,079-80 (1996).

> triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.[18]

"Wire communication" or "communication by wire" is defined expansively in the Communications Act as:

> [T]he transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.[19]

B. *Interpretation of "Pole Attachment" and "Telecommunications Carrier" To Include Wireless and Internet Services*

The FCC has interpreted the terms "pole attachment" and "telecommunications carrier" to include wireless and Internet services. First, the FCC interpreted section 224 to entitle wireless carriers to affix their equipment to utility poles at rates consistent with section 224 and Commission rules.[20] In doing so, the FCC stated that Congress' use of the term "any" in the definitions of "pole attachment" and "telecommunications carrier" precludes "a position that Congress intended to distinguish between wire and wireless attachments."[21] Second, the FCC concluded that cable operators are entitled to the benefits of section 224 when providing commingled Internet and traditional cable services, since it found that "pole attachment" is defined to include any attachment by a "cable television system."[22]

The FCC's interpretations are the subject of a case currently pending before the U.S. Supreme Court. In its October 2001 term, the Court will consider the attachments that a utility must allow on its poles under TA96

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18. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 F.C.C.R. 18,049, 18,059 (1999) (emphasis added).

19. 47 U.S.C. § 153(52) (1999). The Commission stated that the Communication Act's definition of "wire communication" is "far-reaching." *See generally Southwestern Bell Telephone Co.*, 8 F.C.C.R. 2589 (1993) (*citing Second Computer Inquiry*, 77 FCC 2d 384, 451 (1980)). Indeed, the Commission determined that both fiber optics and dark fiber are included in the definition of "wire communications." The Commission found that a fiber optic facility is a "like connection" because it transmits communications through a solid medium within an enclosed system. *See generally In re Norlight*, 2 F.C.C.R. 132, 134 n.22 (1986) (*citing United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)). Similarly, the Commission concluded that dark fiber is a wire communication because the provider of dark fiber owns, maintains, and repairs the fiber and merely leases it to the customer for a term of months or years. *See generally Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Services*, 8 F.C.C.R. 2,589, 2608 (1993), *remanded on other grounds, Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

20. 13 F.C.C.R. 6,777, at 6796-97.

21. *Id.* at 6798.

22. 13 FCC Rcd 6, 777, at 6794.

when it reviews the decision by the U.S. Court of Appeals for the Eleventh Circuit in *Gulf Power v. FCC*.[23] Specifically, the U.S. Court of Appeals for the Eleventh Circuit held that the federal pole attachment requirements did not authorize the Commission to regulate attachments used to provide wireless or Internet service.

The court held that, unlike wireline carriers, wireless providers do not face a bottleneck situation, and therefore monopoly rents, in placing wireless equipment. The court reasoned that the purpose of the pole attachment requirements was to ensure that utility owners of "bottleneck facilities"—that is, poles, wires, conduit, and other equipment that lead directly to the end users of cable or telecommunications services—would not unduly restrict attachments to such facilities by competing wireline cable and telecommunications providers. The court found that wireline providers have no choice but to install equipment on "bottleneck" facilities to reach end users, and are thus exposed to monopoly rates and other unreasonable terms set by the utilities.[24] By contrast, the court questioned whether there were any bottleneck facilities for wireless systems and concluded that wireless providers were not entitled to the protections of the section 224. The court stated that poles are not bottleneck facilities for wireless carriers because wireless equipment may be placed on "any tall building" or other structure. The court also concluded that the "whole set-up requires more physical space then [sic] a wireline system."[25]

In addition, the court found that TA96 allows the Commission to regulate pole attachment rates for cable and telecommunications services. Since Internet service is neither a cable nor telecommunications service, the court held that the FCC lacked authority to regulate pole attachments for Internet service.[26]

Depending on the Supreme Court's decision, utilities may be required to provide access to carriers offering wireless or Internet service. As noted by commenters in the original FCC proceeding, wireless attachments involve unusual requirements and are:

> [U]sually more than a traditional box-like device and cable wires strung between poles. They include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service.[27]

23. 208 F.3d 1263 (11th Cir. 2000) [hereinafter *Gulf Power II*], *cert. granted, FCC v. Gulf Power Co., et al.*, 121 S.Ct. 879 (2001). The Court limited its consideration to two questions: (1) whether Section 224 applies to attachments by "cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming"; and (2) whether Section 224 applies to attachments by "providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services." 121 S.Ct. 879.

24. *Gulf Power II*, 208 F.3d at 1275.

25. *Id.*

26. *Gulf Power II*, 208 F.3d at 1276-78.

27. *See generally* 13 F.C.C.R. 6,777 at 6,799 (*citing* Comments of Edison Electric/UTC, *In re*

Accordingly, as one commenter stated, such attachments may result in "far greater costs and operational considerations."[28] In response to these comments, the FCC stated that there is no "clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations fail."[29]

C. *Nondiscriminatory Requirements of Section 224*

Section 224 provides that a "utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[30] The FCC noted that this provision may suggest that all other utilities that do not provide electric service must grant requests for access regardless of safety concerns. Contrary to that position, the FCC stated that, even given the express language of that provision, it was "reluctant to ignore these concerns simply because the pole owner is not an electric utility."[31] The FCC concluded that "any utility may take into account issues of capacity, safety, reliability and engineering when considering attachment requests, provided the assessment of such factors is done in a nondiscriminatory manner."[32] Nevertheless, the FCC also noted that, with respect to non-electrical utilities' denials of access, the issues will be "scrutinized very carefully, particularly when the parties concerned have a competitive relationship."[33]

In addition, the "lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access," since section 224 directs that modification costs to increase capacity be borne only by the parties directly benefiting from the modification.[34] If a telecommunications carrier's or cable operator's request for access cannot be accommodated due to a lack of available capacity, the FCC will require a utility to modify the facility to increase its capacity under the principle of nondiscrimination subject to the party requesting access bearing the cost of

Amendment of Rules and Policies Governing Pole Attachments, Docket No. 97-94, at 4 (May 12, 1997); Duquesne Light, Petition for Reconsideration, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98, at 17-18).

28. *Id.* (*citing* Comments of Edison Electric/UTC at 5).

29. 13 F.C.C.R. 6,777 at 6,799.

30. 47 U.S.C. § 224 (f)(2) (1999).

31. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 F.C.C.R. 15,499, 16,081 (1996).

32. *Id.*

33. 11 F.C.C.R. 15499, at 16081.

34. *Id.* at 16,076; *Mile Hi Cable Partners L.P. v. Public Service Co. of Colo.*, 15 F.C.C.R. 11,450, 11,470 (2000).

the expansion.[35] Although the FCC initially concluded that this obligation extended to a requirement that a utility should exercise its eminent domain authority to expand existing rights-of-way over private property to accommodate a request for access, on reconsideration, the FCC withdrew this requirement.[36]

D. States' Adoption of Pole Attachment Rules

1. Certification to the FCC

Section 224 (c)(1) of TA96 states that the Commission may not regulate rates, terms, and conditions for, or access to, pole attachments when these matters are regulated by the state.[37] As of 1992, the Commission reported that the nineteen states, identified in Appendix A, certified to the Commission that they regulate the rates, terms, and conditions for pole attachments.[38] Following the amendments to section 224, the Commission declined to require those states to re-certify that they would regulate pole attachments.[39]

2. Range of State Regulation

Since states may adopt their own pole attachment rules, utilities may face differing regulations by state. Although states such as New York have for the most part engrafted the FCC's regulations onto their own administrative codes, other states, such as California, have adopted rules that are not entirely consistent with TA96 or the FCC's regulations.[40]

Certain provisions of the California PUC's 1998 Pole Attachment Order stand in contrast to the requirements of section 224. In its decision adopting the new pole attachment rules, the California PUC defined "public utility" to be "any person, firm or corporation, privately owned, that is an electric, or telephone utility which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way

35. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 14 F.C.C.R. 18,049 (1999).

36. *Id.* at 18,063.

37. 47 U.S.C. § 224(c)(1) (2000).

38. Public Notice, *States That Have Certified That They Regulate Pole Attachments*, 7 F.C.C.R. 1498 (1992).

39. 14 FCC Rcd. 18,049, at 18,089 (1999). Although unnecessary, the California PUC certified its amended rules in its October 22, 1998, decision. *See also* Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Decision No. 98-10-058 (Cal. P.U.C. 1998) [hereinafter *California Pole Attachment Order*].

40. *Pole Attachment Issues*, Case No. 95-C-0341 (N.Y. P.S.C. 1997) ("the overriding decision we have made in this case is that New York's approach to pole attachment matters should, as much as possible, conform to the federal method."); *Pole Attachment Issues Which Arose in Case 94-C-0095*, Case No. 95-C-0341 (N.Y. P.S.C. 1997) (stating that it simplified approach to set pole attachment rates "by adopting the prevailing Federal method as our guide for ratemaking purposes.").

used or useful, in whole or in part, for telecommunications purposes."[41] The California PUC's definition of public utility is limited to the following entities:

(1) large and mid-sized ILECs, namely: Pacific Bell/SBC, GTE California Incorporated/Verizon, Roseville Telephone Company, and Citizens Telecommunications Company of California;

(2) major investor-owned electric utilities: Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company; and

(3) competitive local carriers (CLCs).[42]

The California PUC presently refuses to apply its rules to other categories of investor-owned public utilities, such as gas, water, or steam utilities.[43]

Some of the utilities expressly required by the California PUC to provide access to their poles and other rights-of-way under the pole attachment rules are already providing access to these attachments to a certain extent by leasing unused conduit, cable, and/or pole space for the installation of fiber optic paths by interexchange carriers of telecommunications services.[44] For example, Southern California Edison Company leased to Pacific Lightwave, Inc. (PLI), an interexchange telephone company, underground conduit space and aboveground pole space so that PLI could install fiber optic cable in San Bernardino and five other cities.[45]

Although California has limited the utilities to which the pole attachment requirements will apply, utilities and ILECs throughout the state will be required to offer such access to their poles and other rights-of-way. This access should provide an incentive for competing carriers to enter the market.

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41. *California Pole Attachment Order, supra* note 39, at Appendix A, Section II.

42. *Id.* at 2.

43. *California Pole Attachment Order, supra* note 39, at 2.

44. *See e.g., Application of Pac. Gas and Electric Co. to Permit the Use of Certain of Its Right of Way and to Allow Use of and Access to Certain Other of Its Properties and Facilities by MCI Telecommunications Corp., in Accordance with the Terms of a Right of Way Agreement Dated as of February 19, 1992*, 45 CPUC 2d 24 (1992); *Application of S. Cal. Edison Co. for Authority to Enter Into Four Agreements with Pac. Lightwave, Inc. to Lease Underground Conduit Space and Aboveground Cable Space*, 67 CPUC 2d 140 (1996)[hereinafter *S.Cal. Edison Co. Application*]; *Application of S. Cal. Edison Co. for Authority to Lease to ICG Access Services, Inc. and IntelCom Group Inc. Certain Underground Conduit Space and Certain Currently Available Optical Fibers in Existing Fiber Optic Cables*, 69 CPUC 2d 319 (1996). The California PUC also has approved numerous agreements for utilities to lease fiber optics to third-party telecommunications carriers, which use the fiber to provide telecommunications services. *See e.g., Application of Pac. Gas and Electric Co. to Permit the Use of Certain of Its Right of Way and to Allow Use of and Access to Certain Other of Its Properties and Facilities by MCI Telecommunications Corp., in Accordance with the Terms of a Right of Way Agreement Dated as of February 19, 1992*, 45 CPUC 2d 24 (1992); *Application of San Diego Gas & Electric Co. for Authority to Lease Fiber Optics to MCIM*, 68 CPUC 2d 113 (1996); *Application of S. Cal. Edison Co. for Authority to Enter Into Three Lease Agreements with Pac. Lightwave, Inc. for Certain Optical Fibers in Existing Fiber Optic Cables*, 69 CPUC 2d 30 (1996).

45. 67 CPUC 2d 140 (1996).

On October 22, 1998, the California PUC adopted rules governing the "nondiscriminatory access to the poles, ducts, conduits and rights-of-way (ROW) applicable to all CLCs competing in the local exchange market."[46] The California PUC also stated that it had "jurisdiction to exercise reverse preemption, setting [its] own rules governing access to [rights-of-way], and [it is] not obligated to conform to the FCC rules."[47]

Pursuant to the 1998 Pole Attachment Order, California utilities are required to offer "nondiscriminatory access" to poles. The California PUC defined "nondiscriminatory access" to mean that:

> similarly situated carriers must be provided the opportunity to gain access to the [rights-of-way] and support structures of the incumbent utilities under impartially applied terms and conditions on a first-come, first-served basis. Nondiscriminatory access does not mean that the incumbent utility is divested of all of the benefits or relieved of the obligations of ownership. The utility must maintain the ability to manage its assets. No party may attach to the [rights-of-way] or support structures of another utility without the express written authorization from the utility.[48]

The California PUC also concluded that utilities may "restrict access to a particular facility or may place conditions on access for specified reasons relating to safety or engineering reliability".[49] In contrast to the Federal rules, the California PUC also ordered that ILECs must receive nondiscriminatory access to the facilities of CLCs.[50]

3. Withdrawal of Maryland Public Service Commission's Certification

In 1987, the Maryland Public Service Commission (Maryland PSC) withdrew its certification of regulation of cable television pole attachments from the FCC, pursuant to a September 11, 1987 decision of the Maryland Court of Appeals.[51] The court concluded that the Maryland PSC did not have the authority to regulate pole attachments under the State code, and thus could not certify to the FCC that it did so.[52]

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46. *California Pole Attachment Order, supra* note 39, *order modifying decision and denying rehearing,* Decision No. 00-03-055 (2000), *further modified, Opinion,* Decision No. 00-04-061 (2000) (clarifying that Commission did not adopt express exemption from rules for transmission poles). It must be noted, however, that the California PUC's pole attachment rules govern the "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way (ROW) applicable to all competitive *local* carriers (CLCs) competing in the *local exchange* market." *California Pole Attachment Order supra* note 39, at 2 (emphasis added). In addition, the definition of "telecommunications carrier" specifically excludes "interexchange carriers." *Id.* at Appendix A, Section II(J).

47. *California Pole Attachment Order, supra* note 39, at 7.

48. *Id.* at 20.

49. *California Pole Attachment Order, supra* note 39, at 20.

50. *Id.*

51. *States Which Have Certified That They Regulate Pole Attachments,* 2 F.C.C.R. 7,535 (1987).

52. *Chesapeake and Potomac Tel. Co. of Md. v. Maryland/Delaware Cable Television Ass'n,* 530

Prior to that decision, in 1986, pursuant to a complaint that the Maryland PSC lacked authority over pole attachments, the FCC had found that it would not "prejudge" a state's regulatory scheme for pole attachments once it had filed a certification that it regulated pole attachments.[53] The Commission noted that:

> While we believe that a regulatory scheme should be specific enough to put the parties on notice as to how a complaint will be handled, we will not look behind a certification unless we have evidence that a party is unable to file a complaint with the state commission or the state commission has failed to act on a complaint within the prescribed period.[54]

IV. RESPONSE OF SELF-REGULATING JURISDICTIONS TO THE NEW FEDERAL RULES

Generally, the state commissions have not followed the FCC's lead in implementing separate formulas for telecommunications providers and cable television providers. A survey of the nineteen jurisdictions that regulate pole attachments indicates that the states have not responded to the new federal rules:

Alaska. In April 2000, the Regulatory Commission of Alaska (RCA) issued a notice of inquiry in Docket No. R-00-5 to review the joint use of utility facilities.[55] Among other things, the RCA is considering whether to amend its existing regulations under 3 AAC-52.900–52-940 to apply the new federal regulations to telecommunications carriers. A workshop was held in September 2000, but the RCA has not yet taken final action on the matter.[56]

California. See section III (D)(2) above.

Connecticut. There is no indication that Connecticut will modify its rules to reflect the new federal rules.

Delaware. There is no indication whether the Delaware Public Service Commission plans to change the State's pole attachment rate rules.

District of Columbia. There is no indication whether the Public Service Commission has plans to modify the current rules, established prior to TA96, and which set rates for cable television service providers.[57]

Idaho. The Idaho Public Utilities Commission does not regulate pole

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A.2d 734 (1987).

53. *Certification by the Md. Pub. Serv. Comm'n Concerning Regulation of Cable Television Pole Attachments*, File No. ENF-85-46 (F.C.C. April 8, 1986) [hereinafter *Maryland Certification Order*].

54. *Maryland Certification Order, supra* note 53, at para. 5.

55. Order Denying Petition, Issuing Notice of Inquiry; and Establishing Filing Schedule, *In re Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted under 3 AAC 52.900 – 3 AAC 52.940*, Docket No. R-00-5 (Alaska Reg. Comm'n April 27, 2000).

56. Letter from G. Nanette Thompson, Chairman, Alaska Reg. Comm'n, to Service List in Docket No. R-00-5 (Aug. 11, 2000) *available at* http://www.state.ak.us/googlesearch.html.

57. D.C. MUN. REGS. tit. 15, § 16 (1984).

attachment rates, but limits its involvement to resolving disagreements between parties.[58] Therefore, it likely will not modify its regulations to reflect the new FCC regulations.

Illinois. The State continues to operate under a uniform methodology for calculating the rates cable television service providers must pay to owners of utility poles. These rules were adopted in 1994.[59] There is no indication whether the State will take any action to reflect the federal rule changes in its regulations.

Kentucky. The State continues to operate under a uniform methodology for calculating the rates cable television service providers must pay to owners of utility poles. These rules were adopted in 1982.[60] There is no indication whether the State will take any action to reflect the federal rule changes in its regulations.

Louisiana. In an order issued on March 12, 1999, the Louisiana Public Service Commission froze pole attachment rental rates through December 31, 2002.[61] Specifically, the docket was opened to address whether the rate and other additional current charges restrict the entry of telecommunications, electric, and cable television service providers into their respective markets.

Maine. Maine has been operating under the same pole attachment regulations since 1993, and there is no indication it will modify its rules at this time.[62]

Massachusetts. The Massachusetts Department of Telecommunications and Energy (Department) adopted new regulations governing pole attachments in June 2000.[63] The prior regulations addressed only the rates, terms, and conditions for pole attachments.[64] The new regulations include procedures designed to ensure that access to poles, ducts, conduits, and rights-of-way is provided on a nondiscriminatory basis, and to ensure that rates, terms, and conditions are just and reasonable. In addition to modifying the rules that previously were applicable only to cable attachments to include all pole attachments, the regulations require private landowners to provide non-discriminatory access to their facilities.[65] A Massachusetts superior court recently held that these regulations are an unconstitutional taking under state and federal law.[66] It is anticipated that

58. IDAHO CODE § 61-538 (1983).

59. 18 Ill. Reg. 676 (Feb. 1, 1994).

60. *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments,* Administrative Case No. 251 (Ky. P.S.C. Sept. 17, 1982).

61. *Review of LPSC Orders U-14325, U-14325-A* (La. P.S.C. Dec. 17, 1984) and *Dealing with Agreements for Joint Utilization of Poles and Facilities by Two or More Entities*, Docket No. U-22833 (Mar. 12, 1999).

62. CODE ME. R. § 880. (1993).

63. *Establishing Complaint and Enforcement Procedures,* 98-36-A, slip. op. (Mass. Dept. Telecomm. and Energy 2000)[hereinafter *Mass. DTE Procedures*].

64. MASS REGS. CODE tit. 220 § 45.00 (1993)

65. *Mass. DTE Procedures, supra* note 63.

66. *Greater Boston Real Estate Board, v. Massachusetts Dep't of Telecomm. and Energy,* No. 00-

telecommunications providers may appeal the decision, so the outcome of the Massachusetts rules is unknown at this time.

Michigan. The rates and methodology established in a February 1997 decision are still in effect.[67]

New Jersey. New Jersey allows companies to negotiate pole attachment rates among themselves, and there is no indication it will modify its rules at this time.[68]

New York. Since the FCC adopted its new formula for telecommunications attachment rates, five utilities in New York have filed new tariff pages, reflecting revised cable television pole attachment rates and higher pole attachment rental rates for companies providing telecommunications services. The New York Public Service Department (Department) has combined all the cases and suspended all tariffed rates, pending investigation. The five companies are Central Hudson Gas & Electric Corporation, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Consolidated Edison Company of New York, Inc., and Orange and Rockland Utilities, Inc.[69] If the proposed rates are allowed to go into effect, the telecommunications formula rates of these companies would increase between 300% to 470% over the five-year phase in period. These filings require Department investigation to ensure compliance with the FCC methodology for attachment rates (that the Department has adopted), and to analyze their impact on affected service providers. The rates, charges, rules and regulations sought to be altered by the suspended tariff amendments shall continue in effect until this proceeding has been disposed of or until the period of suspension (July 30, 2001) and any extension thereto has expired, unless otherwise ordered by the Department.[70]

Ohio. The Ohio statute, which generally follows the federal language, holds that pole attachment rates can be no higher than those prescribed by the FCC.[71] The Public Utilities Commission of Ohio began working on a proposal to change the existing pole attachment rates in 1999.[72] The latest changes in the federal guidelines are reflected in the proposed Ohio

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4909-A (Memorandum of Decision and Order for Judgment) (Mass. Sup. Ct. July 27, 2001).

67. Opinion and Order, *In re The Commission's Own Motion, To Examine Setting Just and Reasonable Rates for Attachments to Utility Poles, Ducts, and Conduits, Pursuant to MCL 460.6g; MSA 22.13(6g),* Docket No. U-10831 (Mich. P.S.C. Feb. 11, 1997).

68. 1972 N.J. Laws c. 186, § 20.

69. *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachment and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies*, Docket No's. 01-E-0026, 01-E-0202, 01-E-0250, 01-E-0379, 01-E-0428 (N.Y. P.S.C. July 2, 2001).

70. Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachment and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Companies, Case 01-E-0026, (N.Y. P.S.C. July 2, 2001).

71. OHIO REV. CODE ANN. § 4905.51 (Anderson 2001).

72. *See generally In re the Commission Ordered Investigation for the Existing Local Exchange Competition Guidelines,* Case No's. 99-998-TP-COI; 99-563-TP-COI (Ohio P.S.C. Mar. 1, 2001)

guidelines.

Oregon. Oregon employs a modified version of the old FCC formula to regulate pole attachment rates. In 1999, the Oregon State Legislature mandated rate reductions and stiffened sanctions against unauthorized pole attachers, effective August 2000.[73]

Utah. The Utah Public Utilities Commission becomes involved only if parties cannot reach an agreement about pole attachment rates independently, and therefore does not employ a formula approach like the one the FCC uses.[74]

Vermont. The Vermont Public Service Board (Board) adopted new rules in June 2001 that became effective September 1, 2001.[75] The new rules require pole-owners to permit attachment by CLCs, as well as ILECs and electric utilities that are unable to reach voluntary agreements with pole owners.[76] The new rules contain procedural schedules to prevent undue delay by pole-owning utilities in making attachments available.[77] The changes in rates from the new formula will in most cases reduce revenues to pole-owning utilities, usually by less than one-tenth of 1%.[78] Also, the rates for CLC attachment will be twice that of cable TV attachments, and thus will be more in line with prevailing ILEC attachment rates in Vermont.[79]

Washington. The State does not have a particular formula for pole attachment rates, but encourages parties to negotiate with each other using the FCC rules for guidelines.[80]

V. POLE ATTACHMENT FORMULAS

A. The FCC's Pole Attachment Formula

In the event that parties are unable to agree on the pole attachment formula, and the state has not certified to the FCC that it regulates pole attachments, the FCC regulates the rates to be charged for pole attachments.[81] The FCC implemented rules establishing the pole attachment formulas set forth below which include amendments recently adopted by the FCC to take effect sixty days after the amendments are

73. OR. ADMIN R. 860-022-055 (1998).

74. UTAH ADMIN. CODE 746-345 (2001).

75. Vermont Public Service Board Rules, 3.700 Pole Attachments (2001).

76. *Id.*

77. Vermont Public Service Board Rules, § 3.708(e).

78. Vermont Pub. Serv. Bd., *Proposed Revision to Public Service Board Rule 3.700,* (Pole Attachments, Policy Explanation and Summary of Comments) (Sept. 10, 2001).

79. *Id.*

80. WASH. ADMIN. CODE § 80.36.140 (1985).

81. 47 U.S.C. § 224(e)(1) (2000). Private negotiations are the preferred means of reaching pole attachment arrangements, but utilities have forty-five days to respond to requests for attachment and thirty days to respond to a request for information on rates, terms and condition. A complaining party has thirty days to file a complaint if its request is rejected. 47 C.F.R. § 1.1404 (j) (2000).

published in the Federal Register.[82] Section 224 requires that the formula must "ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments."[83] Rate increases resulting from the new regulations are to be phased in one-fifth each year over five years, commencing February 8, 2001.

Pole Attachment Formula for: (1) Cable Operators Providing Cable Services; and (2) Attachments of Any Telecommunications Carrier or Cable Operator Providing Telecommunications Services *Until* February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \begin{bmatrix} \text{Carrying} \\ \text{Charge} \\ \text{Rate} \end{bmatrix}$$

$$\text{Where Space Factor}^{84} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

Pole Attachment Formula Charged to Any Telecommunications Carrier or Cable Operator Providing Telecommunications Services Beginning February 8, 2001:[85]

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82. *See generally* 47 C.F.R. § 1.1409 (e)(1) (4) (2000); *In re Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6,453 (2000); 13 F.C.C.R. 6,777 (1998); Partial Consolidated Order on Reconsideration, *In re Amendment of Commission's Rules and Policies Governing Pole Attachments,* Docket No. 97-98 (F.C.C. May 25, 2001) [hereinafter *Partial Reconsideration Order*]. The amendments to the rules from the *Partial Reconsideration Order* took effect July 30, 2001. 66 Fed. Reg. 34,569 (June 29, 2001). The FCC's 1998 rules on the formula came under challenge in the *Gulf Power* cases. In *Gulf Power v. United States*, the Eleventh Circuit concluded that TA96's mandatory access provision effects a taking of a utility's property, but found that the Act is not facially unconstitutional under the Fifth Amendment, since the TA96 provides in most cases a constitutionally adequate process to ensure that a utility does not suffer that taking without obtaining just compensation. *Gulf Power I*, 187 F.3d 1324 (11th Cir. 1999). In *Gulf Power II*, among other things, the court held that the nondiscriminatory access provisions authorize a taking of a portion of the poles, but found that whether the FCC's rent formula provides just compensation was not ripe for review. *Gulf Power II*, 208 F.3d at 1272-73.

83. 47 U.S.C. § 224(e)(1) (2000).

84. Presumptions applying to the calculation of the space factor in this formula include: (1) the space occupied by an attachment is one (1) foot; (2) the amount of usable space is 13.5 feet; (3) the amount of unusable space is 24 feet; and (4) the pole height is 37.5 feet. Either party may rebut these presumptions. 47 C.F.R. § 1.1418 (2001).

85. On May 22, 2001, the FCC amended its rules to eliminate the separate formulas established to allocate unusable and usable space costs on poles. *Partial Reconsideration Order, supra* note 82, at 6,804. The Commission stated that, since it will now use a "combined formula for calculating the Telecom Formula rate, [it] will no longer refer to the separate rate calculations for usable and unusable space as space factors." *Id.* at n. 194. The Commission provided that "space factor" refers to the percentage of space occupied in either formula that is multiplied by the net cost of a bare pole and the carrying charges to determine the maximum rate. *Id.* The FCC also amended the presumptions applying to this formula to include: (1) . . . the space occupied by an attachment is presumed to be one (1) foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space}\\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

Formula for Attachments to *Conduit*[86] by Cable Operators and Telecommunications Carriers:

$$\left[\begin{array}{c}\text{Maximum}\\ \text{Rate per}\\ \text{Linear ft./m.}\end{array}\right] = \underbrace{\left[\frac{1}{\text{No. of Ducts}} \times \frac{1\text{ Duct}}{\text{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\left(\begin{array}{c}\text{No. of}\\ \text{Ducts}\end{array}\right) \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \left[\begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}\right]$$

simplified as:

$$\left[\begin{array}{c}\text{Maximum Rate}\\ \text{Per Linear ft./m.}\end{array}\right] = \frac{1\text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \left[\begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}\right]$$

B. Reconsideration of the FCC's Pole Attachment Formula

On May 22, 2001, the FCC responded to various petitions for reconsideration of its orders establishing the pole attachment formulas by adopting a partial order on reconsideration.[87] That order amended, among other things, some of the Commission's pole attachment formulas. Those amendments are reflected in the formulas provided above. In the order, however, the Commission declined to address the two issues pending on the appeal of *Gulf Power II*: (1) the application of the Pole Attachment Act to wireless telecommunications carriers; and (2) the effect of Internet

presumed to be 24 feet. The pole height is presumed to be 37.5 feet. Either party may rebut these presumptions. 47 C.F.R. § 1.1418 (2001); (2) For non-urbanized service areas (under 50,000 population), a presumptive number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five. 47 C.F.R. § 1.1417 (c) (2001).

86. The term "conduit" is defined as "a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed." 47 C.F.R. § 1.1402(i) (2001).

87. *See generally Partial Reconsideration Order*, *supra* note 82.

service on pole attachments. In addition, the Commission stated that the regulatory status of cable Internet access is the subject of an ongoing Notice of Inquiry (NOI). Thus, the Commission noted that those two issues remain open and will be the subject of a later order once it received guidance from the courts and reviewed additional comments received in the NOI proceeding.[88]

C. California's Pole Attachment Formulas

In its 1998 Pole Attachment Order, the California PUC concluded that utilities are entitled to be fairly compensated for providing third-party access to their poles and support structures. The California PUC instructed utilities and attaching entities to negotiate the terms of such access. Should those negotiations fail, however, section 767.5 of the California PUC provides a default pricing formula.[89]

Pursuant to that formula, the California PUC provides for computation of an annual recurring fee as follows:

> (A) For each pole and supporting anchor actually used by the [telecommunications carrier or] cable [TV company], the annual fee shall be two dollars and fifty cents ($2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty cents ($2.50) under this [rule], the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.
>
> (B) For support structures used by the [telecommunications carrier or] cable [TV company], other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unusable by the [telecommunications carrier's or] cable [TV company's] equipment by the total usable volume or capacity. As used in this paragraph, "total usable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unusable by the telecommunications carrier's or cable TV company's equipment.[90]

The California PUC also set forth a provision for a "one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the telecommunications carrier."[91]

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88. *Id.* at para. 3.

89. This formula originally applied to attachments for cable service, but the California PUC found that it should also apply to attachments for telecommunications services as a matter of public policy. This finding is contrary to federal rules that set forth separate price formulas for attachments for cable and telecommunications services. *See generally* 13 F.C.C.R. 6777 at 6,782 (1998).

90. *California Pole Attachment Order*, *supra* note 39, at 69 (Cal. P.U.C. 1998).

91. *Id.* at 225 (1998).

V. CONCERNS AND QUESTIONS

Congress designed TA96 to create competition and break down barriers to entry in the telecommunications market. The market for telecommunications services is generally more competitive today than it has been in the past. As a result, the companies engaged in this business face more difficult financial circumstances. Under these conditions, provisions in TA96 requiring nondiscriminatory treatment of carriers, such as the pole attachment requirements, become significant. Many telecommunications carriers require access to pole attachments or other rights-of-way that are now owned by local utilities in order to offer their service and compete in the industry. These companies are unlikely to accept preferences given to a competitor, in particular, a competitor affiliated with the utility. The extent to which carriers may demand nondiscriminatory access, as well as the impact of the pole attachment requirements on bringing about more competition, under the federal or states requirements, remain to be seen. Although the FCC has laid out rules, it has not considered every eventuality, and it has not determined how inconsistencies between its rules and the rules of certifying states are to be reconciled.

The following are, in the authors' views, open questions or concerns regarding the pole attachment rules as they continue to be interpreted by the FCC, the states, and the courts:

- What is the effect on exclusive agreements which utilities may have reached with a telecommunications service provider?
- How will advancing technologies be treated under the pole attachment rules?
- What is the effect on a joint venture between a utility and a telecommunications service provider?
- If a rate is privately negotiated for access to rights-of-way, does the refusal to provide the same rate to others constitute unlawful discrimination?
- Are the terms of agreements with other telecommunications service providers discoverable?
- Does a utility expose its affiliates in adjacent service territories to access requirements by opening up one system to wire communications use?
- Does a combination utility expose all of its rights-of-way, that is, electric, gas and water, if it only uses one set of rights-of-way?
- If a utility uses its rights-of-way to support its microwave service, has it opened its system to access by others?
- Are there conflicts between federal and state requirements and exemptions?

- What if the easements creating the rights-of-way are restrictive and do not permit multiple uses?
- How are abandoned rights-of-way treated under TA96?

The responses to these questions and concerns may carry significant and enduring consequences on the telecommunications industry. The result may affect (1) how utilities use or allow others to use their rights-of-way in the future; (2) whether Congress' intent in enacting TA96 to remove barriers to competition will ultimately be fulfilled; as well as (3) whether some carriers, in particular those providing wireless or Internet services, requiring access to rights-of-way are able to compete or indeed remain in the marketplace at all.

Appendix A
Nineteen Jurisdictions (Including Washington, D.C.)
Certified to FCC

Alaska
California
Connecticut
Delaware
Idaho
Illinois
Kentucky
Louisiana
Maine
Massachusetts
Michigan
New Jersey
New York
Ohio
Oregon
Utah
Vermont
Washington
Washington, D.C.