

3.700 POLE ATTACHMENTS

3.701 Applicability

- (A) This rule provides complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way owned by a company, as defined in 30 V.S.A. § 201, subject to regulation by the Public Service Board, on rates, terms, and conditions that are just and reasonable. In applying these rules to cable television systems, the Board shall consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.
- (B) Sections 3.703 and 3.704 shall apply to all pole-owning utilities and cable television systems, except when a pole-owner and a cable television system jointly elect to be governed by existing contracts. Both electing parties shall be subject to the terms of the contract in force and on file with the Board on November 1, 1985. Under this election, the rental shall be fixed at the rate obtaining on November 1, 1985.
- (1) Cable television systems for which no pole attachment contract is in effect on November 1, 1985, may elect jointly with the pole-owning utility to be governed by the terms and rental rates of any contract existing at the date of the adoption of this rule to which the pole-owning utility was a party.
- (2) In the case of contracts affecting more than one pole owner, each owner may make a separate election.
- (3) When joint owners make a separate election, the rental for jointly-owned poles shall be calculated according to section 3.703(B).
- (C) The Public Service Board reserves the authority to investigate the terms and rental rate of any cable television system or pole-owning utility making election under this rule and, where the public interest so requires, to modify the terms and to require that a tariff be filed and that the rental rate be calculated according to section 3.703(B).
- (D) This rule is based upon the federal rule on pole attachments, codified at 47 C.F.R. § 1.1401 *et seq.* It is the Board's intent to adopt all of the provisions of the federal rule that do not conflict with Vermont procedures, and that interpretation of this rule should follow interpretations that may be made of the federal rule unless they are explicitly rejected by Vermont authority.

3.702 Definitions

- (A) Cable television system: an entity, as defined in 30 V.S.A. § 501(2) and (3), holding a certificate of public good from the Public Service Board. This definition shall not include common carriers exempted from cable system ownership restrictions by §613(b)(3) of the Cable Communications Policy Act of 1984.
- (B) Utility: any person that is a local exchange carrier or an electric, gas, water, or other public utility regulated by the Board, and who owns or controls poles, ducts, conduits, or

rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad nor any entity that is owned by the Federal Government.

- (C) Pole Attachment: 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.
- (D) Useable space: with respect to poles, the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment. With respect to conduit, the space within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications services.
- (E) Unusable Space: with respect to poles, the space on a utility pole below the usable space, including the amount required to set the depth of the pole. With respect to conduit, the space involved in the construction of a conduit system, without which there would be no usable space, and maintenance ducts reserved for the benefit of all conduit users.
- (F) State: means the State of Vermont or any political subdivision, agency, or instrumentality thereof.
- (G) Telecommunications Carrier: any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).
- (H) Conduit: a pipe placed in the ground in which cables and/or wires may be installed.
- (I) Conduit System: structures that provide physical protection for cable and/or wires that allow new cables to be added along a route.
- (J) Duct: a single enclosed raceway for conductors, cable and/or wire.
- (K) Attaching Entity: includes cable operators, telecommunications carriers, incumbent local exchange carriers, utilities and governmental entities providing cable or telecommunications services.

3.703 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice

- (A) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility 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 or for reasons of safety, reliability, and generally applicable engineering purposes.
- (B) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant

evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

- (C) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days' written notice prior to:
 - (1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's telecommunications carrier's pole attachment agreement;
 - (2) Any increase in pole attachment rates; or
 - (3) Any modification of facilities other than routine maintenance or modification in response to emergencies.
- (D) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (C) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunications service, a copy of the notice. The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed.
- (E) Cable operators must notify pole owners upon offering telecommunications services.

3.704 Complaint

- (A) The complaint shall contain the name and address of the complainant, name and address of the respondent. Counsel for the complainant may sign the complaint. Complainants may join together to file a joint complaint. Complaints filed by associations shall specifically identify each utility, cable television system operator, or telecommunications carrier who is a party to the complaint and shall be accompanied by a document from each identified member certifying that the complaint is being filed on its behalf.
- (B) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.
- (C) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government.
- (D) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:
 - (1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

- (2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.
- (E) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable.
- (F) In any case, where it is claimed that a term or condition is unjust or unreasonable, the claim shall specify all information and argument relied upon to justify said claim.
- (G) In a case where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable:
 - (1) The gross investment by the utility for pole lines;
 - (2) The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;
 - (3) The depreciation reserve from the gross pole line investment;
 - (4) The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available;
 - (5) The total number of poles: (i) owned; and (ii) controlled or used by the utility. If any of these poles are jointly owned, the complaint shall specify the number of such jointly owned poles and the percentage of each joint pole or the number of equivalent poles owned by the subject utility;
 - (6) The total number of poles which are the subject of the complaint;
 - (7) The number of poles included in (6) that are controlled or used by the utility through lease between the utility and other owner(s), and the annual amounts paid by the utility for such rental;
 - (8) The number of poles included in (6) that are owned by the utility and that are leased to other users by the utility, and the annual amounts paid to the utility for such rental;
 - (9) The annual carrying charges attributable to the cost of owning a pole. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section which specifically determines the treatment and amount of accumulated deferred taxes.
 - (10) The rate of return authorized for the utility for intrastate service. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court which establishes this authorized rate of return if the rate of return is at issue in the proceeding and shall note the section which specifically establishes this authorized rate and whether the decision is subject to further

proceedings before the state regulatory body or a court;

- (11) The average amount of usable space per pole for those poles used for pole attachments (13.5 feet may be in lieu of actual measurement, but may be rebutted);
 - (12) The average amount of unusable space per pole for those poles used for pole attachments (a 24 foot presumption may be used in lieu of actual measurement, but the presumption may be rebutted); and
 - (13) Reimbursements received from CATV operators for non-recurring costs. Data and information should be based upon historical or original cost methodology, insofar as possible. Data should be derived from Form M, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). Calculations made in connection with these figures should be provided to the complainant. Where the attachments involve ducts, conduits, or rights of way, in whole or in part, appropriate and equivalent data and information should be filed. The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.
- (H) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (G) of this section.
- (I) With respect to rights-of-way, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (G) of this section.
- (J) If any of the information and data required in paragraphs (G), (H) and (I) of this section is not provided to the cable television operator or telecommunications carrier by the utility upon reasonable request, the cable television operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (G), (H) or (I) of this section, as applicable, after such reasonable request. A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (G), (H) or (I) of this section, as applicable, along with the supporting pages from its FERC Form 1, FCC Form M, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier. The cable television operator or telecommunications carrier, in turn, shall submit these pages with its complaint. If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint.
- (K) If any of the information required in (G) of this section is not provided to the cable

television operator by the utility upon reasonable request, the cable television operator shall include a statement indicating the steps taken to obtain information from the utility, including the dates of all requests. No complaint filed by a cable television operator shall be dismissed where the utility has failed to provide the information in (G) of this section after such reasonable request. A utility should supply a cable television system operator the information required in paragraph (G) of this section, along with the supporting pages from its FERC Form 1, FCC Form M, or other report to a regulatory body, within 30 days of the request by the cable operator. (The cable operator, in turn, shall submit these pages with its complaint). If the utility did not supply these pages to the cable operator in response to the information request, it shall supply this information in its response to the complaint.

- (L) The complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless.
- (M) Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.
- (N) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section §47 U.S.C. 224(f), the complaint shall be filed within 30 days of such denial. In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:
 - (1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;
 - (2) The basis for the complainant's claim that the denial of access is improper;
 - (3) The remedy sought by the complainant;
 - (4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and
 - (5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

3.705 Board consideration of the complaint

- (A) In disputes concerning pole attachments, the Board shall take final action within 360 days after the filing of a complaint, petition, or other application.
- (B) The complainant shall have the burden of establishing a prima facie case that the rate, term, or condition is not just and reasonable or that the denial of access violates § 47 U.S.C. 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the

statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a prima facie case is established by the complainant.

- (C) The Board shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.
- (D) The Board shall deny the complaint if it determines that the complainant has not established a prima facie case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.
- (E) When parties fail to resolve a dispute regarding charges for pole attachments and the Board's complaint procedures under Section 3.404 are invoked, the Board will apply the following formulas for determining a maximum just and reasonable rate:
 - (1) The following formula shall apply to attachments by cable operators providing cable services. This formula shall also apply to attachments by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

- (2) Subject to paragraph (F) the following formula shall apply to pole attachments on a pole by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services beginning on February 8, 2001:

$$\text{Maximum Pole Rate} = \text{Unusable Space Factor} + \text{Usable Space Factor}$$

For purposes of this formula, the unusable space factor, as defined under Section 3.708(B), and the usable space factor, as defined under Section 3.709(B), shall apply per pole.

- (3) Subject to paragraph (F) the following formula shall apply to pole attachments within a conduit system beginning on February 8, 2001:

$$\text{Maximum Conduit Rate} = \text{Conduit Unusable Space Factor} + \text{Conduit Usable Space Factor}$$

For purposes of this formula, the conduit unusable space factor, as defined under Section 3.708(C), and the conduit usable space factor, as defined under Section 3.709(C), shall apply to each linear foot occupied.

- (F) Paragraphs (E)(2) and (E)(3) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that result from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

3.706 Remedies

If the Board determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

- (A) Terminate the unjust and unreasonable rate, term, or condition;
- (B) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Board; and
- (C) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Board from the date that the complaint, as acceptable, was filed, plus interest.

3.707 Imputation of rates; modification costs

- (A) A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.
- (B) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

3.708 Allocation of Unusable Space Costs

- (A) A utility shall apportion the cost of providing unusable space on a pole, duct, conduit, or right-of-way so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all entities.
- (B) With respect to poles, the following formula shall be used to establish the allocation of unusable space costs on a pole for telecommunications carriers and cable operators providing telecommunications services:

$$\text{Pole Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

All attaching entities shall be counted as separate attaching entities for purposes of apportioning the costs of unusable space.

- (C) With respect to conduit, the following formula shall be used to establish the allocation of unusable space costs for telecommunications carriers and cable operators providing telecommunications services within a conduit:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

All attaching entities with lines occupying any portion of a conduit system shall be counted as separate attaching entities for purposes of apportioning the costs of unusable space.

3.709 Allocation of Usable Space Costs

- (A) A utility shall apportion the amount of usable space among all entities according to the percentage of usable space required by each entity.
- (B) With respect to poles, the following formula shall be used to establish the allocation of usable space costs on a pole for telecommunications carriers and cable operators providing telecommunications services:

$$\text{Pole Usable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Usable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

The presumptive 13.5 feet of usable space may be used in lieu of the actual measurement of the total amount of usable space. The presumptive 37.5 feet of pole height may be used in lieu of the actual measurement of each pole. The presumptive one foot of space occupied by attachment is applicable to both cable operators and telecommunications carriers.

- (C) With respect to conduit, the following formula shall be used to establish the allocation of usable space costs within a conduit system:

$$\begin{array}{l} \text{Conduit Usable} \\ \text{Space Factor} \\ \text{Rate} \end{array} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts} \\ \text{less Adjustments for} \\ \text{maintenance ducts}} \times \begin{array}{l} \text{Linear Cost of} \\ \text{Usable Conduit} \\ \text{Space} \end{array} \times \begin{array}{l} \text{Carrying} \\ \text{Charge} \end{array}$$

With respect to conduit, an attacher is presumed to occupy one half-duct of usable space.

Effective Date: November 15, 1985.
Amended: