WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL RULE

AGENCY: Public Service Commission

TITLE-SERIES: 150-38

RULE TYPE: Legislative Exempt

Amendment to Existing Rule: No

Repeal of existing rule: No

RULE NAME: Rules for the Government of Pole Attachments

CITE STATUTORY AUTHORITY: §§ 24-1-1, 24-1-7, 24-2-1, 24-2-2, 31G-4-4

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

February 3, 2020

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Jane Neal -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION

SERIES 38
RULES FOR THE GOVERNMENT OF POLE ATTACHMENTS

§150-38-1. General.

1.1. Scope. -- These rules govern the regulation of pole attachments subject to the jurisdiction of the Public Service Commission pursuant to W. Va. Code §31G-4-4, and subject to regulation under 47 U.S.C. §224, commonly referred to as the Pole Attachment Act and the regulations promulgated thereunder at 47 C.F.R §§1.1401-1.1415.

1.2. Authority. -- W. Va. Code §§24-1-1, 24-1-7, 24-2-1, 24-2-2, 31G-4-4.

1.3. Filing Date. -- December 5, 2019

1.4. Effective Date. -- February 3, 2020

1.5. Intent. -- The Commission has the authority to consider, and will consider, the interests of the subscribers of the services offered by means of pole attachments as well as the interests of the consumers of the utility services. These rules, commonly referred to as the Pole Attachment Rules, adopt the rates, terms, conditions and complaint procedures for access to and use of utility poles, ducts, conduits and rights-of-way, as provided by W.Va. Code §31G-4-4 .

1.6. Application of rules. -- This Series applies to all persons, entities, poles, ducts, conduits and rights-of-way subject to 47 U.S.C. §224 and 47 C.F.R. §§1.1401-1.1415 as the federal statute and those regulations may be amended. An amendment to 47 U.S.C. §224 or 47 C.F.R. §§1.1401-1.1415 shall take effect in West Virginia 60 days after the effective date of the federal change unless otherwise ordered by the Commission.

§150-38-2. Definitions.

2.1. These definitions apply only to the Pole Attachment Rules.

2.2. The term "utility" means 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 communications through wires or cables. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or the State.

2.3. The term "pole attachment" means 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.

2.4. With respect to poles, the term "usable space" means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term usable space means capacity 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 or cable services, and which includes capacity occupied by the utility.

2.5. The term "complaint" means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or

right-of-way in violation of these rules and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. §251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

2.6. The term "complainant" means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. §251(h)) or an association of incumbent local exchange carriers who files a complaint.

2.7. The term "defendant" means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

2.8. The term "State" means the State of West Virginia, or any political subdivision, agency, or instrumentality thereof.

2.9. For purposes of these rules, the term "telecommunications carrier" means 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)).

2.10. The term "conduit" means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

2.11. The term "conduit system" means a collection of one or more conduits together with their supporting infrastructure.

2.12. The term "duct" means a single enclosed raceway for conductors, cable and/or wire.

2.13. With respect to poles, the term "unusable space" means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

2.14. The term "attaching entity" includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

2.15. The term "inner-duct" means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

2.16. The term "make-ready" means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

2.17. The term "complex make-ready" means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

2.18. The term "simple make-ready" means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service

outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

2.19. The term "communications space" means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

2.20. The term "Commission" means the Public Service Commission of West Virginia.

2.21. The term "carrying charge rate" shall include capital costs including a rate of return, income taxes, depreciation, taxes other than income taxes, and an operation and maintenance expense factor.

§150-38-3. Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

3.1. 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 nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

3.2. 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.

3.3. A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

3.3.1. 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 or telecommunications carrier's pole attachment agreement;

3.3.2. Any increase in pole attachment rates; or

3.3.3. Any modification of facilities by the utility, other than make-ready noticed pursuant to Rule 10.5, routine maintenance, or modification in response to emergencies.

3.3.4. 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 Rule 3.3 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 telecommunication service, a copy of the notice, and certification of service as required by Rule 4.2. The utility may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless authorized by the Commission.

3.3.5. Cable operators must notify pole owners upon offering telecommunications services.

§150-38-4. Pole attachment complaint proceedings.

4.1. Pole attachment complaint proceedings shall be governed by Rules 15 through 29 of this Series, except as otherwise provided in this Series.

4.2. The formal complaint shall be filed with the Executive Secretary of the Commission and shall be accompanied by a certification of service on the named defendant, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or defendant.

4.3. 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 or the State.

4.4. The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable television system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

4.4.1. A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

4.4.2. A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

4.5. The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable and provide all data and information supporting such claim. Data and information supporting the complaint (including all information necessary for the Commission to apply the rate formulas in Rule 5.4 should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC Form 1, Annual Report to the Commission or other reports filed with state or federal regulatory agencies (identify source). 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.

4.6. A utility must supply a cable television system operator or telecommunications carrier the information required in Rule 4.5, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, Annual Report to the Commission, or other report to a regulatory body, and calculations made in connection with these figures, within 30 days of the request by the cable television system operator or telecommunications carrier.

4.7. If any of the information and data required in Rules 4.5 and 4.6 is not provided to the cable television system operator or telecommunications carrier by the utility upon reasonable request, the cable television system 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 system operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under Rules 4.5 and 4.6 after such reasonable request.

§150-38-5. Commission consideration of the complaint.

5.1. 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.

5.2. The Commission 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. The Commission shall exclude from actual capital costs, and expense accounts to which the work was charged, those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs.

5.3. The Commission 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.

5.4. The Commission will apply the following formulas for determining a maximum just and reasonable rate:

5.4.1. Formula A shown on Attachment A shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles 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;

5.4.2. With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by Rules 5.4.2.a or 5.4.2.b.

5.4.2.a. Formula B shown on Attachment B applies to the extent that it yields a rate higher than that yielded by the applicable formula in Rule 5.4.2.b;

5.4.2.b. Formula C shown on Attachment C applies to the extent that it yields a rate higher than that yielded by the applicable formula in Rule 5.4.2.a; and

5.4.3. Formula D shown on Attachment D shall apply to attachments to conduit by cable operators and telecommunications carriers.

§150-38-6. Remedies.

6.1. If the Commission 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:

6.1.1. Terminate the unjust and/or unreasonable rate, term, or condition;

6.1.2. Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and/or

6.1.3. 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 Commission, plus interest, consistent with the applicable statute of limitations.

6.2. If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

§150-38-7. Imputation of rates; modification costs.

7.1. 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.

7.2. 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 these rules, 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.

§150-38-8. Allocation of Unusable Space Costs.

8.1. With respect to the applicable formula referenced in Rule 5.4.2, a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds (2/3) of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

8.2. All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

8.3. Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the applicable formula referenced in Rule 5.4.2. For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five. If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

8.4. A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

8.4.1. Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utility's presumptive average number of attachers is based.

8.4.2. Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

8.4.3. The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

8.4.4. Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

§150-38-9. Use of presumptions in calculating the space factor.

9.1. With respect to the formulas referenced in Rules 5.4.1, 5.4.2.a and 5.4.2.b, the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

§150-38-10. Timeline for access to utility poles.

10.1. Definitions.

10.1.1. The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

10.1.2. The term "new attacher" means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

10.1.3. The term "existing attacher" means any entity with equipment on a utility pole.

10.2. All time limits in this section are to be calculated according to Rule 7.5 of the Commission Rules of Practice and Procedure, 150 C.S.R. 1.7.5.

10.3. Application review and survey - Application completeness. A utility shall review a new attacher's attachment application for completeness before reviewing the application on its merits. A new attacher's attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

10.3.1. A utility shall determine within 10 business days after receipt of a new attacher's attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

10.3.2. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide

attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

10.3.3. Application review on the merits. A utility shall respond to the new attacher either by granting access or, consistent with Rule 3.2 denying access within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in Rule 10.7). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

10.3.4. Survey.

10.3.4.a. A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in Rule 10.7).

10.3.4.b. A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the survey, and name of the contractor performing the survey.

10.3.4.c. Where a new attacher has conducted a survey pursuant to Rule 10.10.3, a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to Rule 10.10.3 and by providing a copy of the survey to the affected attachers within the time period set forth in Rule 10.3.4.a. A utility relying on a survey conducted pursuant to Rule 10.10.3 to satisfy all of its obligations under Rule 10.3.4.a shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

10.4. Estimate. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by Rule 10.3, or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

10.4.1 A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

10.4.2. A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

10.4.3. Final invoice. After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

10.4.4. A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

10.5. Make-ready. Upon receipt of payment specified in Rule 10.4.2, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

10.5.1. For attachments in the communications space, the notice shall:

10.5.1.a. Specify where and what make-ready will be performed.

10.5.1.b. Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in Rule 10.7).

10.5.1.c. State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

10.5.1.d. State that if make-ready is not completed by the completion date set by the utility in Rule 10.5.1.b, the new attacher may complete the make-ready specified pursuant to Rule 10.5.1.a.; and

10.5.1.e. State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

10.5.2. For attachments above the communications space, the notice shall:

10.5.2.a. Specify where and what make-ready will be performed.

10.5.2.b. Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in Rule 10.7).

10.5.2.c. State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

10.5.2.d. State that the utility may assert its right to 15 additional days to complete make-ready.

10.5.2.e. State that if make-ready is not completed by the completion date set by the utility in Rule 10.5.2.b (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the make-ready specified pursuant to Rule 10.5.2.a; and

10.5.2.f. State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

10.5.3. Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attacher's contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in Rule 10.5.1.b for communications space attachments or Rule 10.5.2.b for attachments above the communications space.

10.6. A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in Rule 10.5.1.b or its make-ready above the communications space by the same dates for existing attachers in Rule 10.5.2.b (or if the utility has asserted its 15-day right of control, 15 days later).

10.7. For the purposes of compliance with the time periods in this section:

10.7.1. A utility shall apply the timeline described in Rules 10.3 through 10.5 to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in West Virginia.

10.7.2. A utility may add 15 days to the survey period described in Rule 10.3 to larger orders up to the lesser of 3,000 poles or 5 percent of the utility's poles in West Virginia.

10.7.3. A utility may add 45 days to the make-ready periods described in Rule 10.5 to larger orders up to the lesser of 3,000 poles or 5 percent of the utility's poles in West Virginia.

10.7.4. A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3,000 poles or 5 percent of the utility's poles in West Virginia.

10.7.5. A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

10.8. Deviation from the time limits specified in this section.

10.8.1. A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

10.8.2. A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

10.8.3. An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in Rule 10.5.1 is sent by the utility (or up to 105 days in the case of larger orders described in Rule 10.7). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles.

10.9. Self-help remedy.

10.9.1. Surveys. If a utility fails to complete a survey as specified in Rule 10.3.4.a, then a new attacher may conduct the survey in place of the utility and, as specified in Rule 11, hire a contractor to complete a survey.

10.9.1.a. A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

10.9.1.b. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

10.9.2. Make-ready. If make-ready is not complete by the date specified in Rule 10.5, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in Rule 11, hire a contractor to complete the make-ready.

10.9.2.a. A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

10.9.2.b. The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

10.9.2.b.1. Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

10.9.2.b.2. Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

10.9.2.c. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

10.9.3. Pole replacements. Self-help shall not be available for pole replacements.

10.10. One-touch make-ready option. For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this section in lieu of the attachment process described in Rules 10.3 through 10.6 and Rule 10.9.

10.10.1. Attachment application.

10.10.1.a. A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

10.10.1.b. The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

10.10.1.b.1. A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

10.10.1.b.2. If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

10.10.2. Application review on the merits. The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in Rule 10.7).

10.10.2.a. If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, 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.

10.10.2.b. Within the 15-day application review period (or within 30 days in the case of larger orders as described in Rule 10.7), a utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

10.10.3. Surveys. The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in Rule 11.2.

10.10.3.a. The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new

attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

10.10.4. Make-ready. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in Rule 11.2.

10.10.4.a. The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

10.10.4.b. The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either:

10.10.4.b.1. Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

10.10.4.b.2. Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

10.10.4.c. In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by Rules 10.4 through 10.9 and the utility shall provide the notice required by Rule 10.5 as soon as reasonably practicable.

10.10.5. Post-make-ready timeline. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

§150-38-11. Contractors for survey and make-ready.

11.1. Contractors for self-help complex and above the communications space make-ready. A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in Rules 11.3 through 11.3.5 and the utility may not unreasonably withhold its consent.

11.2. Contractors for simple work. A utility may, but is not required, to keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in Rules 11.3 through 11.3.5 and the utility may not unreasonably withhold its consent.

11.2.1. If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in Rule 11.3. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its contractor meets the minimum qualifications described in Rule 11.3 when providing notices required by Rules 10.9.1.b, 10.9.2.a, 10.10.3.a, and 10.10.4.

11.2.2. The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on reasonable safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in Rule 11.3 or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in Rules 10.9.1.b, 10.9.2.a, 10.10.3.a, and 10.10.4 and in its objection must identify at least one available qualified contractor.

11.3. Contractor minimum qualification requirements. Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to Rule 11.2.1, meet the following minimum requirements:

11.3.1. The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

11.3.2. The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

11.3.3. The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

11.3.4. The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

11.3.5. The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform, including work it will perform on facilities owned by existing attachers.

11.4. The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

§150-38-12. Complaints by incumbent local exchange carriers.

12.1. A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. §251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier, or that a utility's rate, term, or

condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in these rules.

12.2. In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of 47 C.F.R. §1.413(b), there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. §251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with Rule 5.4.2. A utility can rebut either or both of the two presumptions in this section with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

§150-38-13. Review period for pole attachment complaints.

13.1. The Commission will take final action consisting of an order that will issue within 180 days of the filing of a formal complaint initiating a pole attachment dispute as required by 47 U.S.C. §224(C)(3)(B)(i) except for good cause shown. If the Commission determines that a final action will not issue within 180 days, the Commission will issue a final action consisting of an order no later than 360 days from the filing of the formal complaint, as permitted by 47 U.S.C. §224(C)(3)(B)(ii).

§150-38-14. Overlashing.

14.1. Prior approval. A utility shall not require prior approval for:

14.1.1. An existing attacher that overlashes its existing wires on a pole; or

14.1.2. For-third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

14.2. Preexisting violations. A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.

14.3. Advance notice. A utility may require no more than 15 days advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If, after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15-day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

14.4. Overlashers' responsibility. A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes

safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

14.5. Post-overlashing review. An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

§150-38-15. Formal Complaint Procedure - General pleading requirements.

15.1. The following procedural rules, Rules 15 through 29, apply to the formal complaint proceedings brought under the Pole Attachment Rules. Pole attachment formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also require or permit other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplemental documents or pleadings.

15.2. Pleadings must be clear, concise, and direct. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

15.3. Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Pole Attachment Act or a Commission rule or order, or a defense to an alleged violation.

15.4. Averred facts, claims, or defenses shall be made in numbered paragraphs and must be supported by relevant evidence. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.

15.5. Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.

15.6. Opposing authorities must be distinguished.

15.7. Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies. In addition, copies of state authorities relied upon shall be provided.

15.8. Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner before a decision is rendered on the merits of the complaint.

15.9. Specific reference shall be made to any tariff or contract provision relied on in support of a claim or defense. Copies of relevant tariffs, contracts, or relevant portions that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such pleading.

15.10. Pleadings shall identify the name, address, telephone number, and email address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party's attorney and shall contain the attorney's West Virginia Bar identification number.

15.11. All attachments shall be Bates-stamped or otherwise numbered sequentially. Parties shall cite to the sequential page numbers in their pleadings.

15.12. Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative, impose appropriate sanctions.

15.13. Parties may petition the Commission for a waiver of any of Rules 15 through 29. Such waiver may be granted for good cause shown.

15.14. A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

15.15. Amendments or supplements to complaints to add new claims or requests for relief are prohibited.

15.16. Failure to prosecute a complaint will be cause for dismissal.

15.17. Any document purporting to be a formal complaint which does not state a cause of action under the Pole Attachment Act, 47 U.S.C. §224, or a Commission rule or order, will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within any applicable statutory limitations of actions.

15.18. Any other pleading that does not conform with the requirements of these rules may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

15.19. Pleadings shall be construed so as to do justice.

15.20. Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the Commission may be subject to appropriate sanctions.

§150-38-16. Format and content of complaints.

A formal complaint shall contain:

16.1. The name of each complainant and defendant;

16.2. The occupation, address and telephone number of each complainant and, to the extent known, each defendant;

16.3. The name, address, telephone number, email address and West Virginia Bar identification number of complainant's attorney, if represented by counsel;

16.4. Citation to the section of the Pole Attachment Act or Commission rule or order alleged to have been violated; each such alleged violation shall be stated in a separate count;

16.5. Legal analysis relevant to the claims and arguments set forth therein;

16.6. The relief sought, including recovery of damages and the amount of damages claimed, if known;

16.7. Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive-level discussions concerning the possibility of settlement. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint;

16.8. A statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission;

16.9. An information designation containing:

16.9.1. The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint or exhibits thereto, and individuals employed by another party; and

16.9.2. A copy, or a description by category and location, of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint.

§150-38-17. Joinder of complainants and causes of action.

17.1. Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act or Commission regulation or order.

17.2. Two or more grounds of complaint involving substantially the same facts may be included in one complaint, but should be separately stated and numbered.

§150-38-18. Answers.

18.1. Any defendant upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within 30 calendar days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

18.2. The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

18.3. The answer shall include legal analysis relevant to the claims and arguments set forth therein.

18.4. Averments in a complaint are deemed to be admitted when not denied in the answer.

18.5. Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with Rule 18.2.

18.6. The answer shall include an information designation containing:

18.6.1. The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, or exhibits thereto, and individuals employed by another party; and

18.6.2. A copy, or a description by category and location, of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint or answer.

18.7. Failure to file an answer may be deemed an admission of the material facts alleged in the complaint. Any defendant that fails to file and serve an answer within the time and in the manner prescribed by this part may be deemed in default and an order may be entered against such defendant in accordance with the allegations contained in the complaint.

§150-38-19. Cross-complaints and counterclaims.

19.1. Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with these rules. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

§150-38-20. Replies.

20.1. A complainant shall file and serve a reply within 10 calendar days of service of the answer, unless otherwise directed by the Commission. The reply shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant. Other allegations or arguments will not be considered by the Commission.

20.2. Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein. Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

20.3. The reply shall include legal analysis relevant to the claims and arguments set forth therein.

20.4. The reply shall include an information designation containing:

20.4.1. The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding and addressed in the reply, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, reply, or exhibits thereto, and individuals employed by another party; and

20.4.2. A copy, or a description by category and location, of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control that are addressed in the reply, excluding documents submitted with the complaint or answer.

§150-38-21. Motions.

21.1. A request for a Commission order shall be by written motion, stating with particularity the grounds and authority therefor, including any supporting legal analysis, and setting forth the relief sought.

21.2. Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion.

21.3. Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.

21.4. Motions to dismiss all or part of a complaint are permitted. The filing of a motion to dismiss does not suspend any other filing deadlines under the Commission's rules, unless the Commission issues an order suspending such deadlines.

21.5. Oppositions to motions shall be filed and served within 5 business days after the motion is served. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting the motion.

21.6. No reply may be filed to an opposition to a motion, except as authorized by the Commission.

§150-38-22. Discovery.

22.1. A complainant may file with the Commission and serve on a defendant, within 10 days of filing the complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, within 10 days of filing an answer, up to 10 written interrogatories. A complainant may file with the Commission and serve on a defendant, within 10 days of the reply, up to five additional written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. This procedure may not be employed for the purpose of delay, harassment, or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding.

22.2. Interrogatories filed and served pursuant to Rule 22.1 shall contain an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

22.3. Unless otherwise directed by the Commission, within 7 calendar days, a responding party shall file with the Commission and serve on the propounding party any opposition and objections to interrogatories. The grounds for objecting to an interrogatory must be stated with specificity. Unless otherwise directed by the Commission, any interrogatories to which no opposition or objection is raised shall be answered within 20 calendar days.

22.4. The Commission shall determine the scope of, and schedule for answering, any disputed interrogatories based upon the justification for the interrogatories properly filed and served pursuant to Rule 22.1, and any objections or oppositions thereto, properly filed and served pursuant to Rule 22.3.

22.5. Interrogatories shall be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them, and the attorney who objects must sign any objections. The answers shall be filed with the Commission and served on the propounding party.

22.6. The Commission, in its discretion, may allow additional discovery, including, but not limited to, document production and/or depositions, and it may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

22.7. The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that:

22.7.1 Indexes the documents by useful identifying information; and

22.7.2. Allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

22.8. A propounding party asserting that a responding party has provided an inadequate or insufficient response to a discovery request may file a motion to compel within 10 days of the service of such response, or as otherwise directed by the Commission, pursuant to the requirements of Rule 21.

§150-38-23. Confidentiality of information produced or exchanged.

23.1. Any information produced in the course of a formal complaint proceeding may be designated as confidential by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the West Virginia Freedom of Information Act (FOIA), W.Va. Code §29B-1-1 et seq. Any party asserting confidentiality for such materials must:

23.1.1. File with the Executive Secretary's Office an unredacted hard copy version of the materials that contains the confidential information and clearly marks each page, including cover page, for which a confidential designation is claimed with a bold header stating "Confidential Version." In addition, all information for which confidential treatment is requested must be identified with the use of bold double square brackets ([[ ]]) at the beginning and end of the material that is redacted in the Public Version. The party claiming confidentiality should restrict its designations to encompass only the specific information that it asserts is confidential. If a confidential designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA and that the designation is narrowly tailored to encompass only confidential information.

23.1.2. File with the Executive Secretary's Office a public version of the materials that redacts any confidential information and clearly marks each page, including the cover page, of the redacted public version with a bold header stating "Public Version." The redaction may be actual blacked-out sections, or, blank sections beginning and ending with bold double square brackets and the phrase "redacted material" within the brackets. The redaction shall cover the entire length of redacted text. The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

23.1.3. The undredacted version must be filed on the same day as the redacted version.

23.2. An attorney of record for a party or a party that receives unredacted materials marked as confidential may disclose such materials solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

23.2.1. Support personnel for counsel of record representing the parties in the complaint action;

23.2.2. Officers or employees of the receiving party who are directly involved in the prosecution or defense of the case;

23.2.3. Consultants or expert witnesses retained by the parties; and

23.2.4. Court reporters and stenographers in accordance with the terms and conditions of this section.

23.3. The individuals identified in Rule 23.2 shall not disclose information designated as confidential to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each such individual who is provided access to the information shall sign a declaration or affidavit stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

23.4. Parties may make copies of materials marked confidential solely for use by the Commission or persons designated in Rule 23.2. Each party shall maintain a log recording the number of copies made of all confidential material and the persons to whom the copies have been provided.

23.5. The Commission may issue a protective order with further restrictions as appropriate.

23.6. Upon termination of a formal complaint proceeding, including all appeals and petitions, the parties, not including Commission Staff, shall ensure that all originals and reproductions of any confidential materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the confidential materials of an opposing or third party shall be destroyed. Commission Staff shall return confidential materials to the Executive Secretary or acknowledge to the Executive Secretary that the materials have been shredded. The Executive Secretary shall maintain copies of the materials marked as confidential in closed envelopes or folders until otherwise directed by the Commission.

§150-38-24. Other required written submissions.

24.1. The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence and presenting relevant legal authority and analysis. The Commission may limit the scope of any briefs to certain subjects or issues. Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding.

24.2. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned.

24.3. The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding.

§150-38-25. Status conference.

25.1. In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. A status conference may include discussion of:

25.1.1. Simplification or narrowing of the issues;

25.1.2. The necessity for or desirability of additional pleadings or evidentiary submissions;

25.1.3. Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

25.1.4. Settlement of all or some of the matters in controversy by agreement of the parties;

25.1.5. Whether discovery is necessary and, if so, the scope, type, and schedule for such discovery;

25.1.6. The schedule for the remainder of the case and the dates for any further status conferences; and

25.1.7. Such other matters that may aid in the disposition of the complaint.

25.2. Parties shall meet and confer prior to the initial status conference to discuss:

25.2.1. Settlement prospects;

25.2.2. Discovery;

25.2.3. Issues in dispute;

25.2.4. Schedules for pleadings; and

25.2.5. Joint statement of stipulated facts, disputed facts, and key legal issues.

25.2.6. Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to the Commission on a date specified by the Commission.

25.3. In addition to the initial status conference referenced in Rule 25.1, any party may also request that a conference be held at any time after the complaint has been filed.

§150-38-26. Separate filings against multiple defendants - Service.

26.1. Complaints may not be brought against multiple defendants unless they are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

26.2. The complainant shall serve the complaint by electronic, overnight, or hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission.

26.3. Upon receipt of the complaint by the Commission, the Commission shall promptly send, by email if available or overnight delivery, to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall issue an order setting a procedural schedule.

26.4. All pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a certificate of service. Service is deemed effective as follows:

26.4.1. Service by hand delivery that is delivered to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day;

26.4.2. Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service; or

26.4.3. Service by email that is fully transmitted to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by email that is fully transmitted to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.

§150-38-27. Conduct of proceedings.

27.1. The Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

27.2. The Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute.

§150-38-28. Accelerated Docket Proceedings.

28.1. Parties to a pole attachment complaint proceeding against a cable television system operator, a utility, or a telecommunications carrier, may request expedited treatment. Proceedings receiving expedited treatment are subject to shorter pleading deadlines and other modifications to the procedural rules that govern pole attachment formal complaint proceedings.

28.2. A complainant may file a motion for expedited treatment at the time a complaint is filed.

28.3. Within five days of receiving service of a pole attachment complaint against a cable television system operator, a utility, or a telecommunications carrier, a defendant may file a motion for expedited treatment.

28.4. The Commission will allow responses to motions for expedited treatment, which must be filed within 5 business days of the filing of the motion unless otherwise ordered by the Commission. The Commission may issue an order, without hearing or further pleadings, granting or denying a motion for expedited treatment. The Commission will attempt, but is not required, to issue such order within fifteen days of filing of the motion.

28.5. In appropriate cases, the Commission may require that the parties participate in pre-filing settlement negotiations or mediation under Rule 29.

28.6. If the parties do not resolve their dispute and the matter is granted expedited treatment, the Commission will establish a procedural schedule.

28.7. If it appears at any time that expedited treatment is no longer appropriate, the Commission may revise the expedited procedural schedule either on its own motion or at the request of any party.

28.8. Commission review of an ALJ recommended decision shall comply with the filing and service requirements of Rule 19 of the Commission Rules of Practice and Procedure, 150 C.S.R 1.19.

§150-38-29. Mediation.

29.1. The Commission encourages parties to attempt to settle or narrow their disputes. Commission Staff is available to conduct mediations. The Commission will determine whether a matter is appropriate for mediation. Participation in mediation is generally voluntary, but may be required as a condition for expedited treatment.

29.2. Parties may request mediation of a dispute at any time as long as a proceeding is pending before the Commission.

29.3. Parties may request mediation by filing a written request for mediation, or including a mediation request in any pleading in a formal complaint proceeding. Any party requesting mediation must verify that it has attempted to contact all other parties to determine whether they are amenable to mediation, and shall state the response of each party, if any.

29.4. The Commission mediator will schedule the mediation in consultation with the parties. The Commission mediator may request written statements and other information from the parties to assist in the mediation.

29.5. In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, hold a case in abeyance pending mediation.

29.6. The parties and Commission mediator shall keep confidential all written and oral communications prepared or made for purposes of the mediation, including mediation submissions, offers of compromise, and the Commission mediator and party comments made during the course of the mediation (Mediation Communications). Neither the Commission mediator nor the parties may use, disclose or seek to disclose Mediation Communications in any proceeding before the Commission (including an arbitration or a formal complaint proceeding involving the instant dispute) or before any other tribunal, unless compelled to do so by law. Documents and information that are otherwise discoverable do not become Mediation Communications merely because they are disclosed or discussed during the mediation. Unless otherwise directed by the Commission, the existence of the mediation will not be treated as confidential.

29.7. Any party or the Commission mediator may terminate a mediation by notifying other participants of their decision to terminate. The Commission mediator shall promptly confirm in writing that the mediation has ended. The confidentiality rules in Rule 29.6 shall continue to apply to any Mediation Communications. Further, unless otherwise directed, any Commission ruling requiring that the existence of the mediation be treated as confidential will continue to apply after the mediation has ended.

FORMULA A
150 C.S.R. 38

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

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

Rate = Space Factor x Cost

Where Cost

in Service Areas where the number of Attaching Entities is 5 = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.56 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.31 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N X (Net Cost of a Bare Pole X Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

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

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of Bare Pole} \times \left[\begin{matrix}\text{Maintenance and Administration} \\ \text{Carrying Charge}\end{matrix}\right]$$

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

FORMULA D
150 C.S.R. 38

$$\text{Maximum Rate per Linear ft/m} = \underbrace{\left[\frac{1}{\text{No. of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\text{No. of Ducts} \times \frac{\text{Net Conduit Invt}}{\text{Sys Duct Lgth (ft/m)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \text{Carrying Charge Rate}$$

Simplified as:

$$\text{Maximum Rate Per Linear ft/m} = \frac{1 \text{ Duct}}{\text{Number of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft/m)}} \times \text{Carrying Charge Rate}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.