PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 5th day of December 2019.

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments

COMMISSION ORDER

The Commission adopts Rules for the Government of Pole Attachments, 150 C.S.R. 38, commonly referred to as the Pole Attachment Rules, as required by W.Va. Code §31G-4-4.

BACKGROUND

On March 5, 2019, the West Virginia Legislature passed Enrolled Substitute for Senate Bill 3 (SB 3) that was effective from passage. Among other things, SB 3 added W.Va. Code §31G-4-4 granting the Commission regulatory jurisdiction over the provisions of Article 4 of Chapter 31G.

W.Va. Code §31G-4-4 provides:

> (a) The Public Service Commission shall possess and exercise regulatory jurisdiction over the provisions of this article. The commission shall administer and adjudicate disputes relating to the issues and procedures provided for under this article.
>
> (b) The commission shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein.
>
> (c) The commission shall certify to the Federal Communications Commission that this state, as evidenced by the enactment of this article, hereby exercises jurisdiction over the regulation of pole attachments. The certification shall include notice that the State of West Virginia hereby:

(1) Regulates the rates, terms, and conditions related to pole attachments; and

(2) In so regulating such rates, terms, and conditions, the state has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the services.

On June 4, 2019, the Commission initiated a general investigation into the implementation of the requirements of W.Va. Code §31G-4-4 to adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415 (FCC Regulations), inclusive, of the dispute resolution process incorporated by reference in those regulations. The FCC formal complaint rules for pole attachments referenced in W.Va. Code §31G-4-4 are found at 47 C.F.R. §§1.720-1.740 (FCC Procedural Rules). Case No. 19-0551-T-GI.

On October 11, 2019, the Commission issued an Order closing the general investigation and instituting a rulemaking proceeding promulgating proposed Pole Attachment Rules, 150 C.S.R. 38 (Sometimes referred to as Rules). The Commission established a comment period and required the Executive Secretary to file the proposed Pole Attachment Rules with the Secretary of State along with the required forms, publish notice and serve the Order on interested parties. A comment period was established setting October 28, 2019, as the deadline for Initial Comments and November 12, 2019, as the deadline for Reply Comments.

On October 15, 2019, the Commission filed an Amended Order requiring the reformatting and re-filing of the proposed Pole Attachment Rules to conform to certain formatting requirements of the West Virginia Secretary of State and revising the comment period.

Initial Comments were filed by Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and The Potomac Edison Company (joint filing referred to as the Companies); Lumos Networks LLC dba Segra and Lumos Networks of West Virginia, Inc. dba Segra (joint filing) (Segra); Frontier West Virginia, Inc. and Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia (Frontier); CTIA-The Wireless Association (CTIA); the West Virginia Cable Telecommunications Association (WVTCA); CenturyLink and Staff.

Reply Comments were filed by the Companies, Staff, Segra, Frontier, CTIA and the WVCTA.[1]

[1] References to Initial Comments will be abbreviated with "IC" and Reply Comments with "RC".

DISCUSSION

Generally, Frontier, Segra, CTIA, CenturyLink and WVCTA were favorable to the adoption of the Pole Attachment Rules as proposed by the Commission. Frontier, CTIA and CenturyLink proposed no revisions to the proposed Rules. Segra recommended that the Commission include a proposed rule that provides for automatic adoption of prospective updates of the FCC's pole attachment rules unless the Commission either initiates an action on its own motion or via a petition by an interested party. Segra also recommended that the Commission remove the proposed Pole Attachment Rules 15-29 that track the FCC Procedural Rules, and simply utilize its current procedural rules for the processing of complaints. The WVCTA recommended a revision to proposed Rule 5.1.

The Companies recommended numerous revisions to the proposed Rules including the removal of the formal complaint procedures at Rules 15-29.

The Commission has reviewed and considered all comments and proposed revisions to the proposed Pole Attachment Rules. The Commission will address the comments and each substantive change made to the proposed Pole Attachment Rules. Changes in style, correction of typographical errors, and simple edits for clarification of a rule are self-evident and will not be discussed specifically in this Order.

SUMMARY OF INITIAL COMMENTS

The Companies

Rule 2 – Definitions

The Companies recommended that the Commission replace the term "provider of telecommunications service" with the term "telecommunications carrier" in the definition of "pole attachment" in Rule 2.2. In support of this they point out that the phrase "provider of telecommunications service" and "telecommunications carrier" mean the same thing under federal law. 47 U.S.C. 153(51) (defining "telecommunications carrier" to mean "any provider of telecommunications services"). The specific term used throughout the Pole Attachment Rules, is the term "telecommunications carrier."

The Companies also recommended that the Commission include entities whose sole purpose is to provide broadband service within the definition of "pole attachment." The Companies asserted that the inclusion of broadband only service would help fulfill the purpose of Chapter 31G to promote broadband deployment in West Virginia. The Companies explained that there are numerous entities - like Google Fiber - that provide broadband service but are neither a "cable television system" nor a "telecommunications carrier."

The Companies proposed that the definition of "Usable Space" in Rule 2.3 be revised to exclude the communication worker safety zone, asserting that the communications attachments are the cost-causers of this space and therefore should bear at least a pro rata share of this cost. If the communication worker safety zone is not excluded from the meaning of "usable space," the result is that an electric utility pole owner bears the entire cost of the communication worker safety zone, which serves no purpose other than to protect communications workers. The Companies admitted that although this proposal is a departure from the FCC's rules, it would follow the lead of a number of states that have reverse-preempted the FCC's pole attachment jurisdiction, including, but not limited to, Arkansas. Likewise, the Companies contended that the definition of "Unusable Space" at Rule 2.12 should be revised to include the communication worker safety zone.

The Companies also recommended that the definition of "carrying charge rate" in Rule 2.20 specifically include an administrative and general component and a rate of return component. They stated that the FCC's rules do not include a definition of "carrying charge rate," and the actual components of the carrying charge rate are well defined under FCC precedent and include the following components: (1) operations and maintenance expense, (2) administrative and general expense, (3) a depreciation expense, (4) a tax expense, and (5) a rate of return. If the Commission is going to define the term "carrying charge rate" at all, it should eliminate ambiguity by specifically including all components that comprise the carrying charge rate under FCC precedent.

Rule 3.1 – Access to poles

According to the Companies, their agreements with landowners for easements and rights-of-way do not grant the right for other third-party attachers to place their facilities on the real property of others and do not provide rights of ingress or egress. In order to have that right, the attachers must seek and obtain written easement or license permission from the landowners. A provision should be added at the end of Rule 3.1 stating, "provided however that any attacher must secure and obtain the written authorization from the landowner for the placement of attacher's facilities on real property prior to being granted access to the utility's facilities." This would eliminate any confusion over who is responsible for obtaining the underlying land rights to enable a third party to make an attachment.

Rule 5.1 – Complainant's burden of proof

The Companies recommended that Rule 5.1 track the corresponding FCC rule. The substitution of the clause "a just and reasonable rate based primarily on cost," for "statutory minimum just and reasonable rate," obfuscates what the Companies must demonstrate to establish that a rate falls below a "just and reasonable" rate. By incorporating 47 U.S.C §224(d)'s statutory limit on rate regulation, the FCC Rule provides a level of clarity that Rule 5.1, as proposed by the Commission, does not

provide. The WVCTA's Initial Comments regarding this rule are in line with the Companies. The WVCTA recommended that the Commission revise Rule 5.1 to track FCC Rule 1.406(a).

Rule 5.2

The Companies suggested that the Commission revise the last sentence of Rule 5.2 to conform to the FCC's corresponding rule on capital cost reimbursements. They asserted that FCC Rule 1.1406(b) is clear and reflects the longstanding practice of treating make-ready reimbursements and all customer contributions in aid of construction as rate base neutral.

Rule 5.4.2 – Rate formulas

The Companies recommended deleting Rule 5.4.2 (the Telecom Rate) and revising Rule 5.4.1 (the Cable Rate) so the same rate formula in Appendix A applies to all pole attachments. In support of this proposal the Companies explained that the original Pole Attachments Act, passed by Congress in 1978, protected only cable television companies and included a single formula applicable to all attachments. This formula, current FCC Rule 1.1406(d)(1), which is identical to proposed Rule 5.4.1, provides the "Cable Rate."

Congress added telecommunications carriers through the Telecommunications Act of 1996 and adopted a different formula which, rather than allocating the unusable space pro rata based on the amount of usable space occupied, allocated 2/3 of the cost of unusable space equally among all attaching entities. See 47 U.S.C. §224(e)(2). The rate yielded by this formula is known as the "Telecom Rate." The intent of the telecom rate formula, as initially recognized by the FCC and the courts, was that telecom carriers would pay a higher rate than cable television companies.

The Companies stated that as more cable television attachments became subject to the higher telecommunication rate based on the types of services offered by cable television companies, the FCC intervened to protect the cable companies and re-defined the "cost" allocated through the telecom rate formula so that the formula result was roughly equal to the cable rate formula result.

According to the Companies, the Commission may adopt the cable rate formula as the rate formula applicable to attachments by cable television systems and telecommunications carriers. This approach would simplify the Rules and yield a result consistent not only with the FCC's Rules, but also with the FCC's intent.

Rule 8 – Allocation of unusable space

The Companies asserted that Rule 8 only matters if the Commission retains Rule 5.4.2 (the telecom rate formula). If Rule 5.4.2 is deleted, then Rule 8 can be deleted because the cost of the unusable space would be allocated pro rata based on the

percentage of usable space occupied as provided in Rule 5.4.1 and the formula set forth at Attachment A.

Rule 9.1 – Use of presumptions in calculating the space factor

The Companies pointed out that the Commission should add a reference to Rule 5.4.1 in Rule 9.1. The references to Rules 5.4.2.a and 5.4.2.b can be deleted if the Commission deletes the provision for the telecom rate formula at Rule 5.4.2. Also, because the Companies proposed that the Commission exclude the communication worker safety zone from the "usable space", they also proposed adjusting the amount of presumed usable space to 10.5 feet and the presumed amount of unusable space to 27 feet.

Rule 10.3.4 – Survey

The Companies recommended that the Commission revise Rules 10.3.4.a and 10.3.4.b from mandatory to permissive to lessen the burden on electric utilities associated with surveys. Additionally, the Rules should require proposed attachers to include in their applications any known information on others attached to the applicable poles or pole lines. The prior notice for a survey should be reduced from three business days to 24 hours. The Commission should revise Rule 10.3.4.c to make the new attacher, instead of the utility, responsible to notify affected attachers.

Rule 10.4 – Estimate

The Companies argued that the Commission should revise the Rule 10.4 requirement that electric utilities gather estimates from each of the existing attachers and present them to the new attacher as it is completely at odds with Rule 10.5.3, which places the burden of coordinating make-ready on the new attacher. The proposed Rule ignores the fact that it is the new attacher, not the electric utility, that is motivated to obtain estimates from the existing attachers to the pole so that it can proceed with its work. The Companies also contended that the pole-by-pole estimate requirement presents a number of problems. The administrative burden associated with generating such a breakdown would be time and cost prohibitive. In addition, make-ready estimates do not always lend themselves to a per-pole cost breakdown because certain costs cannot accurately be assigned on a per-pole basis. If attachers are permitted to request itemized estimates on a pole-by-pole basis, the Rule should allow pole owners to recover any additional costs flowing from such a request.

Rule 10.5.3 – Notice

The Companies stated that the Commission should revise Rule 10.5.3 to place the make-ready notice requirements on new attachers. The make-ready is being done at the request, and for the sole benefit, of the new attacher. The new attacher, and not the electric utility, should be saddled with the burden of sending make-ready notices to

existing attachers on the pole. The Companies' existing electronic notification systems are not designed to forward this type of notice to existing attachers.

Rule 10.9.2 – Make-ready

The Companies also contended that Rule 10.9.2 should be revised to limit the self-help remedy to only the communications space. The Companies strongly oppose proposed Rule 10.9.2 creating a self-help remedy above the communications space. The FCC's corresponding rule, FCC Rule 1.1411(i)(2), is the subject of (1) an appeal in the Ninth Circuit by a group of electric utilities that includes AEP, and (2) a Petition for Reconsideration with the FCC by a group of utilities that includes First Energy. Rule 10.9.2 directly conflicts with W.Va. Code §31G-4-3(a), which provides:

> Notwithstanding any provision of this code to the contrary, the provisions of this article shall not apply to: (1) Facilities located above the "Communications Worker Safety Zone" as such term is defined in the National Electric Safety Code; or (2) Any electric supply facilities wherever located.

The Companies stated that the Commission should not adopt the FCC power supply space self-help rule that conflicts with W.Va. Code §31G-4-3.

In support of their argument, the Companies asserted that the purpose of the power supply space self-help remedy adopted by the FCC was, allegedly, to speed deployment by allowing new attachers to hire contractors to perform self-help make-ready in the power supply space when electric utilities failed to meet the FCC deadlines for make-ready. According to the Companies, electric utility make-ready does not cause delay in the make-ready process and represents a small portion of the overall work. The Companies adhere to applicable FCC power supply space make-ready deadlines.

The position of the Companies is that a power supply space self-help remedy such as the one adopted by the FCC presents a serious danger to the safety of workers and the public by placing attaching entities in control of contractors working in the power supply space.

The Companies asserted that the FCC's Broadband Deployment Advisory Committee, the industry group comprised largely of attaching entity representatives that helped create consensus rules upon which much of the 2018 Order[2] is based, did not propose a power supply space self-help remedy. Further, no state public utility commission has adopted such a rule.

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[2] Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling, WC Docket No 17-84 and WT Docket No. 17-79, released August 3, 2018 (2018 Order).

Rules 10.10.2, 10.10.3.a – One-Touch Make-Ready

The Companies recommended that Rule 10.10.2 be revised to provide that any contractor used by the new attacher include a professional engineer stamp with all survey results certifying the make-ready work is "simple." In addition, Rule 10.10.3.a should require more than three days notice to allow utilities to participate in One Touch Make Ready (OTMR) self-help surveys. Thirty days instead of fifteen are necessary for the OTMR application review process.

The Companies also proposed the addition of a Rule 10.10.6 – Replacement poles (commonly referred to as "double wood"). Specifically, they argued that the Commission should enable pole owners to transfer all communications company cables, at the expense of the communications company, in a manner consistent with the communications space make-ready self-help remedy. Alternatively, the Commission should adopt a rule to provide that after a new pole is in place, other attachers have six months to transfer their facilities to the new pole.

Rule 11.1 – Contractors for self-help complex and above the communications space make-ready

The Companies commented that the Commission should delete references to self-help above the communications space in Rule 11.1, and should not allow communications companies to perform work in the electric supply space. They stated that, as discussed in their comments on Rule 10.9.2, not only is allowing communications companies to perform work in the electric supply space a bad idea, but it is also inconsistent with W.Va. Code §31G-4-3. Accordingly, references to self-help above the communications space within proposed Rule 11.1 should be deleted.

Rule 12 – Complaints by incumbent local exchange carriers (ILECs)

The Companies argued that the Commission should delete Rule 12 because, pursuant to W.Va. Code §§ 24-2-3, 24-2-6, 24-2-7, 24-2-12, the Commission already regulates joint use agreements between electric utilities and ILECs. The Companies believe proposed Rule 12 conflicts with the Commission's existing jurisdiction over joint use agreements. ILECs and electric utilities share space on each other's poles in their overlapping service areas to avoid the cost and public nuisance of redundant pole lines. The rates, terms, and conditions governing those relationships are set forth in joint use agreements. The Companies have a number of joint use agreements and joint pole ownership agreements, some of which have been in place for many decades.

According to the Companies, the presumptions contained in Rule 12 are tantamount to the Commission presuming that existing joint use agreements are presumed to be unjust and unreasonable when there are no facts that support such a presumption. The presumption in proposed Rule 12.2 that ILECs are "similarly situated"

to telecommunications carriers and cable television providers does not bear a "sound factual connection" to the facts because ILECs place a greater burden on poles than their competitors. The Companies further noted that the FCC, in the context of complaint proceedings, concluded that joint use agreements typically provide ILECs with a number of advantages not afforded to other types of attaching entities.

The Companies explained that although the FCC adopted a presumption similar to the presumption in Rule 12.2 in 2018, it did so based on the alleged repeated "disputes" between ILECs and electric utilities (a circumstance not present here). 2018 Order at ¶ 129. Further, the Companies believe that the FCC's new presumption is unlawful and have challenged this portion of the FCC's 2018 Order.

Rule 12 would also place the burden on an electric utility to disprove the faulty presumption contained therein by clear and convincing evidence. The Rule would place the burden of proof on the party seeking to uphold the joint use agreement, rather than on the party seeking to get out of the express terms of the contract. Also, the proposed Rule purports to require an electric utility to meet its misplaced burden of proving an incorrect presumption by a "clear and convincing evidence" standard. The clear and convincing evidence standard is a higher burden of proof than the "preponderance of the evidence" standard that ordinarily governs civil litigation.

The Companies stated that, if the Commission retains Rule 12 the effective date of 47 C.F.R. §1.1413(b) should be corrected or simply state "contracts entered into after the effective date of this rule."

Rule 13 – Review period for pole attachment complaints

The Companies asserted that the Commission should revise the title of Rule 13 to clarify that the review period contained therein applies only to pole access complaints. Proposed Rule 13.1 adopts the FCC's rule governing the "review period" applicable to pole access complaints as provided at 47 C.F.R. §1.1414(a). Rule 13.1 does not adopt the FCC's "review period" for "other pole attachment complaints" as provided at 47 C.F.R. §1.1414(b). The Companies contended that, as a consequence, the Commission's well-established rules of practice and procedure govern all "other pole attachment complaints," such as those challenging the rates, terms and conditions of pole attachment agreements.

Rule 14 – Overlashing[3]

The Companies contended that the Commission should adopt a modified version of Rule 14 that (1) prohibits overlashing into existing violations, (2) confirms that overlashing may be denied for capacity, safety, reliability and engineering reasons, and (3) confirms that overlashers are responsible for the cost of evaluating the proposed overlashing. Specifically, the Companies argue that the first sentence of Rule 14.2 should be deleted because it conflicts with Rule 3.1, which allows a utility to deny access "where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes." A preexisting violation may pose a capacity, safety, reliability or engineering issue that must be resolved prior to overlashing. The Companies stated that overlashing into an existing violation is a dangerous practice for at least three reasons: (1) it can endanger the safety of the communications worker performing the overlashing (for example, causing the communications worker to enter into the power space), (2) it can endanger the safety of the public by compounding existing violations (for example, low hanging wires over a roadway); and (3) it can threaten the reliability of the electric infrastructure by compounding an existing problem (for example, further overloading an already-overloaded pole).

The Companies agree that the new attacher to the pole should not be responsible for the cost of remedying existing violations caused by other attaching entities. However, this provision, in combination with the preceding sentence stating that utilities cannot prevent an overlasher from attaching based on a third party's preexisting violation, seems to put the onus on the electric utility to push forward with correcting the violation and hope to recover the cost later. There are at least two problems with this approach. First, by allowing make-ready to proceed before the cost-causer is identified, the draft rule would deprive the existing attacher of its contractual right to be notified of the violation and pursue a less-costly remedy, such as removal of the attachment. Second, if the violation is corrected before the attacher is notified, there is no "evidence" to back-up the assignment of cost causation. This becomes particularly important when the corrective action is a pole change-out.

The Companies believe the most effective way to address delays in correcting existing violations would be a rule requiring existing attachers to correct violations identified by a utility within fifteen days of notice to the existing attacher, and providing that where the existing attacher fails to do so, the new attacher may proceed with correcting the violation at the existing attacher's sole expense.

[3] Although not a defined term in the FCC Regulations that the Commission has been required to adopt, in the context of pole attachment regulation, "overlashing" is the practice whereby a service provider physically ties wiring to other wiring already secured to the pole to accommodate additional strands of fiber or coaxial cable on existing pole attachments.

Rule 14.3 – Advance Notice

The Companies support the proposed rule insofar as it would expressly allow electric utilities to require advance notice of overlashing. As proposed, Rule 14.2 allows a utility to require advance notice of overlashing - presumably so that a utility may evaluate whether the proposed overlash would create a capacity, safety, reliability or engineering issue. The proposed rule does not, however, expressly allow a utility to deny access if an issue is identified. Rather, the draft rule glosses-over this important step and purports to move directly to requiring a utility to provide specific documentation of the issue to the party seeking to overlash. The Commission should revise Rule 14.3 to avoid any ambiguity and to avoid potential conflict with Rule 3.1, which expressly allows a utility to deny access "where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes."

Rule 14.3 states that an electric utility "may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash." Though this provision does not expressly prohibit an electric utility from recovering the incremental costs incurred in connection with the engineering review of the proposed overlash, the Companies are concerned that attaching entities would attempt to use this language to shift these costs to electric ratepayers. A rule that even arguably undermines a utility's ability to recover pole attachment costs from the entity that caused those costs would run afoul of longstanding cost causation precedent and shift those costs to electric utilities and their ratepayers. When a proposed overlash requires an engineering analysis the overlasher is the "cost causer," and the overlasher should bear the cost of that analysis. Other reverse-preemption states, such as Arkansas, explicitly allow pole owners to recover the costs to review proposed overlashes.

Rules 15-29 – Formal Complaint Rules

The Companies asserted that the Commission should not adopt Rules 15 through 29 incorporating the FCC's formal complaint rules. As previously stated by Staff, "adoption of a separate set of procedural rules would be inconsistent with W.Va. Code §24-1-7 which provides that the Commission procedural rules are applicable to all matters coming before it." The FCC cpnsolidated separate complaint rules applicable to different types of complaint proceedings into one set of complaint rules. This Commission's adoption of a separate set of complaint rules for pole attachment proceedings would be contrary to the spirit of the FCC's formal complaint rules.

Rule 17 – Damages

If the Commission keeps the proposed pole attachment procedural rules, the Companies assert that the Commission should delete Rule 17 regarding damages. The enactment of W.Va. Code §31G-4-4(b) created an indirect conflict with W.Va. Code §24-2-7 which prohibits the Commission from awarding damages. In addition, Staff recommended that the Commission adopt those provisions of the FCC Procedural Rules

that do not conflict with applicable statutes or the Commission's current Rules of Practice and Procedure. The Companies noted that Staff recommended that the Commission not adopt provisions that provide for the imposition of fees and allow claims for damages.

The Companies also stated that the damages provision contained within the FCC's formal complaint rules, FCC Rule 1.723, is not applicable to pole attachment complaint proceedings. The Companies stated that the history of the FCC's formal complaint rules support its position. Those rules, including FCC Rule 1.723, originally applied to Section 208 complaints, and not to pole attachment complaint proceedings. Only recently did the FCC adopt revisions to its formal complaint rules that made those rules applicable to pole attachment complaints. Because the revised formal complaint procedures are now applicable to pole attachment complaint proceedings, in addition to Section 208 complaints, FCC Rule 1.723 appears on its face to apply to pole attachment complaint proceedings. However, that is not the case. The Companies stated that as recently as 2011, the FCC has declined to adopt rules allowing for the imposition of damages in pole attachment complaint proceedings. See 2011 Order at 5288-89, ¶¶ 107-109 ("we decline at this time to amend Rule 1.1410 to allow compensatory damages.").

Rule 22.1 – Discovery

According to the Companies, if the Commission adopts the FCC's formal complaint rules, the Commission should improve them by revising Rule 22 to specify that the propounding of interrogatories shall occur after the filing of the complaint, answer, and reply. In practice, this rule has proven to be unworkable because it stacks the discovery deadlines on top of the pleading deadlines. The Commission should improve the FCC's rules by requiring that any interrogatories be served within ten days following the close of the pleading cycle. This change would provide a discovery process that is more closely aligned with the Commission's traditional adjudicatory procedures.

Staff

Staff recommended that the Commission (i) add a provision that provides for joinder of complainants and causes of action similar to 47 C.F.R. §1.725, (ii) clarify whether the omission of any reference to 47 C.F.R. §1.406 was intentional, (iii) clarify that Rule 2 - Definitions and Rule 17 - Damages apply only to the Pole Attachment Rules and, (iv) establish an escrow account for the purpose of receiving deposits pursuant to Rule 17.6, and develop rules for its management and operation.

Segra

Segra stated that the Commission has done an excellent job in Rules §150-38-1 through §150-38-14 of adopting rules based primarily on the FCC existing pole attachment rules. Adoption of the existing FCC rules allows the Commission to take advantage of the FCC's "fully vetted" regulations, minimizes disruption to attachers, and thereby provides predictability and uniformity necessary to facilitate continued

investment in broadband facilities in West Virginia. The Rules promote efficiency by allowing providers and pole owners that do business in more than one state to resolve disputes under a common set of rules. Adoption of these Rules will contribute to the timely deployment of vital broadband services in West Virginia, which in turn, will foster future economic growth and technological innovation.

Segra recommended that the Commission add a rule to provide for adoption of prospective updates of the FCC's pole attachment rules unless the Commission either initiates an action on its own motion or via a petition by an interested party.

Segra contended that adoption of the FCC Procedural Rules adds unnecessary complexity for attachers seeking a timely resolution of pole attachment disputes. Segra recommended that the Commission scuttle the proposed procedural rules and utilize its current procedural rules to process informal and formal complaints until the Commission gains more experience in administering pole attachment complaints.

Segra contended that the Commission should interpret W.Va. Code §31G-4-4(b) to require adoption of only those provisions of the FCC's pole attachment regulations that actually apply to the specific process for setting rates, terms and conditions of pole attachments in West Virginia, and not the purely procedural rules applicable only to the FCC's rather unique complaint processing procedures. The Commission should rely upon the formal complaint, mediation, and adjudicative procedures within its Rules of Practice and Procedure.

West Virginia Cable Telecommunications Association (WVCTA)

The WVCTA commended the Commission on the proposed Rules, which substantially accomplish the objectives of West Virginia law while reconciling various provisions of the FCC rules with certain pre-existing rules of the Commission. The adoption of rules consistent with the FCC and with the large body of case law that accompanies the rules, promotes uniformity in pole attachment regulation and will facilitate broadband deployment and competition in West Virginia.

The WVCTA recommended that the Commission revise Rule 5.1 to more closely track FCC Rule 1.406(a) because the proposed Rule provides no explanation why the language in Rule 5.1 deviates from the FCC Regulations. The WVCTA asserts that the deviation is material, however, because as the FCC's statutory minimum, incremental cost standard is based entirely on "the additional costs of providing pole attachments…" as provided in §224(d)(1) of the Pole Attachment Act.

Frontier

Frontier stated that the proposed Rules would fully implement W.Va. Code §31G-4-4's requirement that the Commission "adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and

47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations." Frontier reserved the right to submit a reply in response to any other comments that the Commission may receive in this proceeding.

CTIA - The Wireless Association

CTIA urged the prompt adoption of the proposed Rules and reserved further comment for replies to initial comments.

CenturyLink

CenturyLink applauded the Commission's adoption of Pole Attachment Rules. CenturyLink stated that the Rules are consistent with the best practices and expedited time frames adopted by the FCC in recent revisions to its pole attachment rules. The Rules incorporate a measured and flexible approach that mirror changes recently made by the FCC to drive out delays and streamline the process for pole attachments. Further, the Rules facilitate industry cooperation and include an expedited dispute resolution process if business-to-business negotiations fail. These provisions are critical to ensuring the pole attachment processes are not a source of delay in broadband deployment. The Rules achieve a critical balance of ensuring ease of access to poles without burdensome processes for pole owners. The Rules are consistent with the legislative intent of SB 3 and are in the public interest.

SUMMARY OF REPLY COMMENTS

Staff

Staff recommended that the Commission not adopt the change proposed by the WVCTA regarding the rate, asserting that the Commission should ensure that the utility covers its incremental costs so that ratepayers do not subsidize the telecommunications industry. Staff also recommended that the Commission adopt the suggestion made by Segra to include language allowing the Commission to opt out of automatic adoption of FCC rule changes. Staff recommended that the Commission not adopt any of the Companies' proposed changes.

WVCTA

WVCTA stated that all parties except the Companies agreed that the proposed Rules fulfill the mandate provided in W.Va. Code §31G-4-4. The WVCTA pointed out that the FCC rules are the product of a comprehensive rulemaking proceeding to streamline and improve pole attachment rules to facilitate the same interests sought by West Virginia, citing the FCC's 2018 Order. The Companies (and various other electric utilities) made many of the same objections during the FCC proceeding that they make in this proceeding. The FCC modified its rules where it deemed appropriate and rejected other proposals after due consideration. The WVCTA asserted that the FCC rules reflect

a careful balancing of interests in the context of establishing effective rules that will promote deployment and competition.

WVCTA provided a specific example of the Companies' departure from the FCC rules in their proposal to require that the communications worker safety zone be classified as "unusable space". WVCTA stated that this proposal would substantially increase the cost of pole attachments and cited cases in which the FCC rejected this proposal. The WVCTA also stated that the Companies' proposal to require attachers to obtain written consent from private landowners for easements before being allowed to access poles conflicts with the FCC rules and 47 U.S.C. §224, which allows electric companies to deny pole access only "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." Therefore, the Companies' proposal is contrary to W. Va. Code §31 G-4-4(b). WVCTA stated that cable systems generally have access to private easements under the federal Cable Act, 47 U.S.C. §541(a)(2), and to public and private easements under W.Va. Code §§24D-1-9(a) (right to use easements) and 24D-1-9(i)(4)(covering any "public or private easement for electric, gas, telephone or other utility transmission").

Segra

Segra agreed with Staff that the Commission should clarify the Rules to ensure that the Definitions section applies only to the Pole Attachment Rules. Segra also agreed with the WVCTA and the Companies that Rule 5.1 track the language of the corresponding FCC regulation. Segra opposed the majority of the Companies' recommendations, contending that those recommendations deviate from FCC regulations that have already been the subject of extensive FCC review. In its 2018 Order the FCC addressed the make-ready process, including the "one-touch make-ready" process, overlashing and the safety and reliability concerns expressed by the Companies. Segra recommended automatic adoption of future FCC regulations because they would address any concerns about changes to the FCC regulations as a result of appeals by the electric utilities. Segra continued to recommend that the Commission not adopt the proposed pole attachment procedural rules, asserting that the Commission's current Rules of Practice and Procedure are adequate.

Frontier

Frontier agreed with the Staff and WVCTA revisions. Frontier opposed the Companies' proposed revisions because they deviate from the FCC's pole attachment regulations and would create substantive differences between the Commission's Pole Attachment Rules and the FCC's pole attachment regulations. Frontier noted that Commission jurisdiction and authority are conferred by statute and emphasized the requirements of W.Va. Code §31G-4-4(b).

CTIA

CTIA stated that it was encouraged to see that the proposed Rules largely mirrored the FCC's regulations. CTIA contended that the revisions to the Rules proposed by the Companies are contrary to the clear directive of the Legislature and are an attempt to re-litigate FCC precedent on pole attachment regulation. CTIA pointed out that the Pennsylvania Public Utility Commission recently took jurisdiction over pole attachments using the same approach, simply adopting the FCC regulations, without any legislative directive, similar to W.Va. Code §31G-4-4.[4] The FCC has already reviewed and rejected the Companies' proposals to revise the definition of "Usable Space" and to assign make-ready responsibilities to attachers that the FCC has placed on pole owners. CTIA also contended that the Companies' recommendation to adopt a specific rule requiring attachers to obtain written authorization from landowners is inappropriate. Access to property is a contractual issue that is worked out prior to an attachment. The Companies' proposal would only add another unnecessary hurdle for all attachments even when additional authorization is unnecessary. SB 3 is clear in its directive that the Commission adopt the FCC's rules, therefore, the Companies revisions should be dismissed.

CTIA stated that it does not object to the Companies' proposal to use the term "telecommunications carrier" in the two instances in the Rules where the term "provider of telecommunications services" is used. CTIA also pointed out errors in the formula reflected on Attachment D of the Rules and recommended that the Commission review the Rules for any other errors. CTIA recommended that the Commission review the procedural provisions of the Rules and adopt only those provisions that apply to the specific process of setting rates, terms and conditions of pole attachments in West Virginia. CTIA agreed with Segra that the Commission should establish a process to rapidly consider and adopt future FCC rule changes.

Companies

The Companies urged the Commission to embrace the approach of other reverse preemption states, such as Arkansas and Louisiana, and adopt its own pole attachment regulations that are tailored to serve West Virginia's specific needs, and reject wholesale adoption of the FCC pole attachment rules. The Companies asserted that the Commission's proposed rules tilt unnecessarily in favor of the interests of the communications companies. The Companies continued to agree with Segra that the Commission should not adopt a separate set of procedural rules and, instead, apply its current procedural rules to pole attachment proceedings. The Companies agreed with the WVCTA that the Commission should revise Rule 5.1 to more closely track FCC Rule 1.1406(a). They also recommended that the Commission modify the Rules, if adopted as proposed, if the Companies are successful in an appeal of FCC Rules 1.1411(i)(2), 1.1415 and 1.1413 in the Ninth Circuit. Finally, the Companies asserted that Segra's proposal to adopt a rule providing for automatic adoption of new FCC rules conflicts with

[4] Penn. Pub. Util. Comm'n, Final Rulemaking Order, Docket No. L-2018-3002672 (Sep. 3, 2019).

the intent of W.Va. Code §31G-4-4, and is contrary to the rulemaking requirements of the Administrative Procedures Act.

COMMISSION COMMENTS

All commenters, with the exception of the Companies, generally supported the adoption of the substantive portion of the FCC's rules as proposed by the Commission, with a few recommended changes. As stated in their Executive Summary, the Companies took the position that the Legislature did not empower the Commission to follow the FCC regulations lock-step, but in a way that meets the purpose of the FCC rules. The Companies proposed numerous material revisions to the proposed Rules. Companies I.C. Executive Summary ¶¶ 1,8.

The Commission disagrees with the Companies position that the Commission may adopt rules that deviate materially from the FCC Regulations. The Legislature, by the passage of SB 3, directed the Commission to " ...adopt the rates, terms, and conditions ... as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein." Our charge could not be more clear. The Legislature did not direct the Commission to adopt pole attachment rules similar to the FCC Regulations, or to adopt the FCC Regulations with the exception of certain provisions of the FCC Regulations such as those for usable space, rate formulas, survey requirements or ILECs. As we stated in the October 11, 2019 Order,

> The proposed Pole Attachment Rules were drafted on the basis that the Commission should adopt rules that reflect, as closely as possible, the substantive requirements and processes set forth in the FCC Regulations and FCC Procedural Rules while eliminating those provisions that contain requirements and processes that are unique to FCC operations and do not apply or make sense under the Commission's current structure and operations.

October 11, 2019 Order at 12.

The Commission did not state that we would eliminate provisions because they require new procedures or may be challenging to administer.

Therefore, the Commission will not accept any of the Companies' proposed revisions that materially change the duties, responsibilities, rate calculations, terms or conditions provided for in the FCC's scheme of pole attachment regulation. Specifically, we do not accept the Companies' proposals regarding:

(i) Rule 2.3 to change the definition of "usable space" to exclude the communication worker safety zone;

(ii) Rule 2.12 to change the definition of "unusable space" to include the communication worker safety zone;

(iii) Rule 3.1 to require attachers to obtain written authorization from landowners as a condition for access to poles;

(iv) Rule 5.4 to delete the provisions for the Telecom Rate formula;

(v) Rule 8 to delete the Rule because it relates to the Telecom Rate;

(vi) Rule 9 to change the presumptions of usable space;

(vii) Rules 10.3.4, 10.4 and 10.5.3 to change the utility's and attacher's obligations regarding surveys, notice and estimates;

(viii) Rule 10.9.2 to change the make-ready requirements;

(ix) Rule 10.10.2 to require an engineer's stamp certifying that the work is "simple";

(x) Rule 10.10.6 to authorize pole owners to transfer attachments to new poles and charge attachers;

(xi) Rule 11.1 to revise the requirements for the utilities' list of authorized contractors;

(xii) Rule 12 to delete the Rule and remove ILECs from the Pole Attachment Rules; and

(xiii) Rule 14 to change the obligations and requirements regarding overlashing.

Adoption of any of these revisions would constitute a substantive change to the FCC scheme of pole attachment regulation and would, therefore, be a departure from the mandate of W.Va. Code §31G-4-4(b).

While the Commission is rejecting most of the Companies' revisions because they reflect substantial departure from the FCC Regulations that the Commission is required to adopt, a few of the issues raised by the Companies bear further discussion.

The Commission appreciates the Companies' concerns about safety and reliability of equipment expressed in their proposed revisions regarding self-help make-ready, work above the communication worker safety zone and overlashing. However, as pointed out by some of the commenters, the FCC considered these concerns in the 2018 Wireline Infrastructure case and provided safeguards including the 90-day make-ready period for

utilities, deviation from the required timeline for make-ready by utilities if necessary, utility approval of contractors, and advance and post-completion notice of self-help.

There may be a conflict with the requirements of W.Va. Code §31G-4-3(a) that the provisions of Chapter 31G, Article 4 shall not apply to facilities located above the communication worker safety zone and Rule 10.9.2. that provides for a self-help remedy above the communications space. However, the mandate of the Legislature in W.Va. Code §31G-4-4 to adopt the rates, terms and conditions of the FCC Regulations is clear. To the extent that there is a conflict, the statute passed later in time will apply. State ex rel. Pinson v. Varney, 96 S.E.2d 72 (1956).

Also, with regard to overlashing, as Segra stated in its Reply Comments, the FCC has considered the Companies' concerns regarding overlashing. The Commission does not reject the Companies' proposed revisions lightly. The FCC, however, has reviewed the overlashing issues and determined that the advance notice requirement has been sufficient to address safety and reliability concerns. Segra, RC at 7, citing the 2018 Wireline Infrastructure Order at ¶ 115. Also, as Segra stated, the FCC found that the ability to overlash often marks the difference between being able to provide broadband service within weeks instead of months. Id. at 8. As stated above, the Companies' proposals about overlashing are a departure from the FCC scheme that the Commission has been directed to adopt. If a utility determines that an overlashing creates capacity safety, reliability or engineering concerns that cannot be worked out between the utility and the overlasher, the utility or overlasher may file a complaint and request expedited treatment. Interim relief may be requested by a utility to enjoin the proposed overlashing until the case is resolved.

As the Companies asserted, the Commission has exercised jurisdiction to regulate joint use agreements between electric utilities and ILECs under the general regulatory authority to regulate utilities as provided in W.Va. Code Chapter 24. The Legislature has, however, chosen to provide a specific framework for the regulation of pole attachment disputes between the Companies and ILECs in Chapter 31G by the passage of SB 3. The Legislature required the Commission to adopt the rates, terms and conditions as provided in 47 C.F.R. §§1.1401 through 1.1415 and did not exclude FCC Regulation 1.1413 that includes ILECs from that requirement. To the extent the Companies are aggrieved by the manner that the Legislature has directed the Commission to regulate pole attachments by ILECs, or any other provision of the Pole Attachment Rules, the Companies should seek appropriate changes to the statute.

The Companies proposal to change the definition of "pole attachment" to replace the term "provider of telecommunication service" with "telecommunications carrier" does not appear to be a substantive change, especially because the term "telecommunications carrier" is used throughout the Rules. None of the other commenters requested this change. The term "telecommunications carrier" is defined at Rule 2.8 as "any provider of telecommunications services, except aggregators of telecommunications services or ILECs." The terms are interchangeable. The

Commission does not agree that this proposed change improves the Rules and does not accept this change to the Defintions.

With regard to adding the term "broadband-only providers" to the definition of pole attachment, the FCC did not include broadband-only service providers in the definition and there was no input from the other commenters about the implications of this revision or the claim of the Companies that inclusion of broadband-only providers would help fulfill the purpose of Chapter 31G. The Companies explained that broadband service falls outside of the protection of 47 U.S.C. §224 because broadband only providers are neither "providers of telecommunications service" nor "telecommunications carriers". The Commission will not expand the definition but may broaden it in the future if experience dictates that changes are warranted.

The Commission has made certain revisions to the proposed Rules. W.Va. Code §31G-4-4(b) requires that the Commission adopt the rates, terms and conditions of the FCC Regulations, "and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein." With regard to the adoption of future modifications of 47 U.S.C §224 and/or 47 C.F.R. §§1.1401-1.1415, the Commission provided in Rule 1.5 for "adoption of future changes as those regulations may be amended". Upon review of the comments of the Companies, Staff and Segra, the Commission will revise Rules 1.5 and 1.6 to clarify the requirement to adopt subsequent modifications. The Commission will add a 60-day waiting period until new federal regulations become effective in West Virginia and a provision that the new federal law will become effective unless otherwise ordered by the Commission to provide the Commission the opportunity to review the new law or regulation and determine if any rulemaking procedure is necessary at the state level.

With regard to Rule 2 – Definitions, the Commission agrees with Staff and Segra that there should be no uncertainty that the definitions in the Pole Attachment Rules apply only to pole attachment proceedings and have added a new Rule 2.1 clarifying that the definitions apply only to the Pole Attachment Rules.

The Commission added a definition of "carrying charge" at Rule 2.20 for purposes of clarification. As a result of the Companies' comments, the Commission revised the definition to specifically add the rate of return component. As pointed out by the Companies, administrative and general expenses are included in operation and maintenance expenses.

Upon review of the comments by the Companies, the WVCTA and Segra regarding Rule 5.1, the Commission agrees that Rule 5.1 should be revised to track the language of FCC Regulation 1.1406(a).

The Commission did not follow the exact language of FCC Regulation 1.1406(b) in corresponding Rule 5.2 because the FCC Regulation is not clear and, although it may work in practice, it does not work as described by the Companies. The last sentence of

the FCC Regulation states that any reimbursement for non-recurring costs are excluded from capital costs. A true contribution in aid of construction should be deducted from capital cost. However, if a reimbursement is for an operation and maintenance expense it would not be deducted from capital costs, but would be excluded from operation and maintenance expense. The Commission agrees with the Companies' comments and example stating that reimbursed expenses for a pole change out are charged to the same capital and expense accounts to which the work was originally charged. The Commission has revised Rule 5.2 to clarify that reimbursed operation and maintenance expenses will be credited to expense accounts.

Rule 9.1 will be corrected to include a reference to Rule 5.4.1.

Contrary to the Companies' interpretation, the Commission did not intend for the adoption of Rule 13.1 to limit the application of the pole attachment procedural rules to pole access complaints. Rule 13.1 corresponds to FCC Regulation 1.1414(a). FCC Regulation 1.1414(b) provides that FCC Procedural Rule 1.740 shall govern the review period for all other pole attachment complaints. FCC Procedural Rule §1.740 provides for the review period for complaints under 47 U.S.C. §208. The Legislature granted the Commission authority to operate under 47 U.S.C. §224. The Commission, therefore, did not adopt FCC Regulation 1.1414(b). To eliminate any confusion about the review period Rule 13 will be revised to provide for a 180-day review period for all pole attachment complaints as provided in 47 U.S.C. §224(c)(3)(B)(i). This will also ensure that the Commission has adopted a review period that will maintain reverse preemption. The Commission will endeavor to process pole attachment cases as expeditiously as possible and expects that most cases may be processed in less than 180 days.

The Companies, Staff and Segra recommended that the Commission not adopt the FCC Procedural Rules and instead use our current Rules of Practice and Procedure in the administration of pole attachment complaints. Their recommendation ignores the requirement of W.Va. Code §31G-4-4(b) to adopt, " ... the dispute resolution process incorporated by reference in those regulations...." The Commission has had more than a little consternation with respect to adoption of another set of procedural rules. To throw out the FCC Procedural Rules, however, would require the Commission to ignore the plain language of W.Va. Code §31G-4-4(b). The mandate of W.Va. Code §24-1-7 to adopt procedural rules that are applicable to all matters coming before us does not restrict the Commission from adopting different procedures for different types of cases, especially when required by the Legislature under a different chapter of the Code.

However, after careful consideration and review of the comments provided by the Companies, the provision for awarding damages at Rule 17 will be removed. The Commission has not historically been a venue with authority to grant damage awards. More importantly, as the Companies stated, the FCC has not included compensatory damages in FCC Regulation 1.1407 that governs remedies. Although the FCC Procedural Rules include a rule on damages, as pointed out by the Companies, those Rules apply to other types of proceedings and the FCC does not award damages in pole

attachment complaint cases. The Companies referred the Commission to the 2011 FCC Order in which the FCC stated that it declined to amend Rule 1.1410 to include compensatory damages. Companies I.C. at 42. Therefore, the provisions for damages in the proposed Rules will be removed.

Pursuant to the Staff recommendation, the Commission added the provision for joinder at new Rule 17.

The Commission intentionally omitted a rule that corresponds to FCC Regulation 1.1406(e) because, as the WVCTA pointed out, Rule 1.8 of the Commission's Rules for the Government of Telephone Utilities require LECs to use Part 32 (ARMIS) data.

The Companies' recommendation to change Rule 22.1 to allow service of interrogatories ten days after the pleading is not a material change to the FCC procedural process and is reasonable.

The Commission understands that certain FCC regulations are under appeal or reconsideration. The Commission will consider any subsequent modifications to the FCC Regulations as required by W.Va. Code §31G-4-4.

The Legislature has determined that West Virginia should reverse-preempt FCC jurisdiction over pole attachment regulation and has directed the Commission to achieve reverse-preemption by adopting the FCC scheme of pole attachment regulation, including the FCC dispute resolution procedure. The Commission may consider modifications to the Pole Attachment Rules either by petition or on our own motion in the event the Legislature makes future modifications to the W.Va. Code that gives the Commission the authority to adopt Pole Attachment Rules and dispute resolution procedures that depart from the FCC scheme of regulation.

The final Pole Attachment Rules adopted by this proceeding are attached to this Order as Exhibit A. For informational purposes only, an unofficial black line version of the Rules showing the changes to the proposed Pole Attachment Rules is attached as Exhibit B. Corrections have been made to the rate formulas as reflected in the final rules.

FINDINGS OF FACT

1. The Commission proposed Rules for the Government of Pole Attachments 150 C.S.R. 38, as required by W.Va Code §31G4-4.

2. The public had notice of this proceeding, as evidenced by the affidavits of publication filed with the Commission, and a comment period.

3. The Commission has considered the comments received in this matter in making the decisions herein.

CONCLUSION OF LAW

After giving consideration to the filed comments, the proposed Rules for the Government of Pole Attachments, with modifications as noted herein, should be promulgated as final rules.

ORDER

IT IS THEREFORE ORDERED that the Rules for the Government of Pole Attachments, 150 C.S.R. Series 38, attached hereto as Exhibit A are promulgated as final rules effective sixty days from the date of this Order.

IT IS FURTHER ORDERED that the Commission Executive Secretary file a clean copy of the text of the final Rules for the Government of Pole Attachments, 150 C.S.R. 38 with the required forms with the office of the West Virginia Secretary of State.

IT IS FURTHER ORDERED that on entry of this Order, General Order No. 261 is closed and shall be removed from the docket of open cases

IT IS FURTHER ORDERED that the Executive Secretary serve a copy of this Order on all parties that filed comments in Case No. 19-0551-T-GI and General Order No. 261 by electronic service if e-service agreements are on file, or by United States First Class Mail and on Staff by hand delivery.

IT IS FURTHER ORDERED that the Executive Secretary serve a copy of this Order on all public utilities in West Virginia except railroads, public service districts and cooperatives. The Executive Secretary shall also serve all cable systems and telecommunications companies and the Consumer Advocate Division by electronic service if e-service agreements are on file, or by United States First Class Mail.

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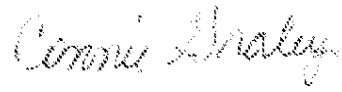

Connie Graley, Executive Secretary

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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. --

1.4. Effective Date. --

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.

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

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

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.

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

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

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

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

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.

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. --

1.4. Effective Date. --

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 ~~provided in 47 U.S.C. §224 and 47 C.F.R §§1.1401-1.1421~~5, as provided by W.Va. Code §31G-4-4 ~~inclusive of future changes as these regulations may be amended, for the regulation of pole attachments in West Virginia 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 ~~these~~ the federal statute and those regulations may be amended. An amendment to the 47 U.S.C. §224 ~~OR~~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.~~1~~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.~~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.~~3~~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.

2.4~~4~~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.~~5~~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.~~6~~7. The term "defendant" means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

2.~~7~~8. The term "State" means the State of West Virginia, or any political subdivision, agency, or instrumentality thereof.

2.~~8~~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.~~9~~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.~~10~~11. The term "conduit system" means a collection of one or more conduits together with their supporting infrastructure.

2.~~11~~12. The term "duct" means a single enclosed raceway for conductors, cable and/or wire.

2.~~12~~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.~~13~~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.~~14~~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.~~15~~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.~~16~~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.

2.1~~7~~8. 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.

2.1~~8~~9. The term "communications space" means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

2.~~19~~20. The term "Commission" means the Public Service Commission of West Virginia.

2.2~~0~~1. 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 non-discriminatory 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 ~~a~~ the statutory minimum just and reasonable rate, ~~based primarily on~~

~~cost.~~ 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 ~~deduct~~ 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. ~~contributions or advances in aid of construction received by the utility and will exclude from operation and maintenance expenses and taxes any reimbursements received from cable operators and telecommunications carriers.~~

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 ~~3000~~ 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 ~~3000~~ 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 ~~3000~~ 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 ~~October 4, 2018 (~~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. ~~Pole access complaints. Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Commission shall have the discretion to pause the 180-day review period in situations where actions outside the Commission's control are responsible for delaying review of a pole access complaint.~~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 ~~270~~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. ~~Damages.~~Joinder of complainants and causes of action.

17.1. ~~If a complainant in a formal complaint proceeding wishes to recover damages, the complaint must contain a clear and unequivocal request for damages~~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. ~~In all cases in which recovery of damages is sought, the complaint must include either:~~
Two or more grounds of complaint involving substantially the same facts may be included in one complaint, but should be separately stated and numbered.

~~17.2.1. A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to prove the amount of such damages; or~~

~~17.2.2. If any information not in the possession of the complainant is necessary to develop a detailed computation of damages, an explanation of:~~

~~17.2.2.a. Why such information is unavailable to the complaining party;~~

~~17.2.2.b. The factual basis the complainant has for believing that such evidence of damages exists; and~~

~~17.2.2.c. A detailed outline of the methodology that would be used to create a computation of damages with such evidence.~~

~~17.3. If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:~~

~~17.3.1. Comply with the requirements of Rule 17.1, and~~

~~17.3.2. State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.~~

~~17.4. If the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time bifurcate the case and order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with Rule 17.5 will determine damages.~~

~~17.5. If a complainant exercises its right under Rule 17.3, or the Commission invokes its authority under Rule 17.4, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint within sixty days after a decision that contains a finding of liability on the merits of the original complaint. Supplemental complaints filed pursuant to this section need not comply with the requirements in Rules 15.3 or 15.4, 15.7, 15.8, 15.10 and 15.11. The supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.~~

~~17.6. The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:~~

~~17.6.1. The complainant's potential irreparable injury in the absence of such deposit;~~

~~17.6.2. The extent to which damages can be accurately calculated;~~

~~17.6.3. The balance of the hardships between the complainant and the defendant; and~~

~~17.6.4. Whether public interest considerations favor the posting of the bond or ordering of the deposit.~~

~~17.7. The Commission may, in its discretion, end adjudication of damages by adopting a damages computation method or formula. In such cases, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within 30 days of the release date of the damages order, parties shall submit jointly to the Commission either:~~

~~17.7.1. A statement detailing the parties' agreement as to the amount of damages;~~

~~17.7.2. A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or~~

~~17.7.3. A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.~~

~~17.8. In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, suspend ongoing damages proceedings to provide the parties with time to pursue settlement negotiations or mediation under Rule 29.~~

§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 ~~or supplemental complaint filed pursuant to Rule 17.5~~ 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, ~~concurrently with its complaint~~within 10 days of filing the complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, ~~concurrently with its answer~~within 10 days of filing an answer, up to 10 written interrogatories. A complainant may file with the Commission and serve on a defendant, ~~concurrently with its reply~~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[2]." 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.

234.1. 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.

~~26.5. Supplemental complaints filed pursuant to Rule 17 shall conform to the requirements set forth in this section.~~

§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.

28.98. 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.

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

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

Rate = Space Factor 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.

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

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

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

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.