Before the
Federal Communications Commission
Washington, D.C. 20554

Cable Television Association of Georgia, *et al*., Complainants	)	File No. PA 98-004
v.	)	
BellSouth Telecommunications, Inc., Respondent.	)	

ORDER

Adopted: July 17, 2002 **Released: July 19, 2002**

By the Chief, Enforcement Bureau:[1]

1. In this Order we grant a pole attachment complaint ("Complaint") filed by the Cable Television Association of Georgia, *et al*. ("CTAG")[2] against BellSouth Telecommunications, Inc. ("BellSouth") pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")[3] and Subpart J of Part 1 of the Commission's rules.[4] BellSouth, a local exchange carrier, filed a Response to the Complaint and CTAG filed a Reply. In this Order, we find BellSouth's annual pole attachment rate of $5.03 to be unjust and unreasonable, we set a just and reasonable annual pole attachment rate of $4.27 per pole, and we order refunds.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments 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.[5] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and

[1] Effective March 25, 2002, the Commission transferred responsibility for resolving pole attachment complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, FCC 02-10, 17 FCC Rcd 4672 (2002).

[2] CTAG filed on behalf of 19 of its cable operator members that have pole attachment agreements with BellSouth. *See* Attachment A for a list of cable operators represented by CTAG in this matter and the dates the members were included in the Complaint.

[3] 47 U.S.C. §224.

[4] 47 C.F.R. §§1.1401-1.1418.

[5] 47 U.S.C. § 224 (b) (1).

conditions, except where such matters are regulated by a State.[6] The Commission is authorized and has adopted procedures necessary to resolve complaints concerning such rates, terms, and conditions.[7] The Commission has concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[8]

3. In addition, the Pole Attachment Act, as amended by the Telecommunications Act of 1996 ("1996 Act"),[9] imposes upon all utilities, the duty to "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."[10] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[11]

4. The Commission has developed a formula methodology to determine maximum allowable pole attachment rates to ensure that such rates are just and reasonable.[12] A utility may not charge more than the maximum amount permitted by the formulas developed by the Commission. The Commission's Cable Formula,[13] used in resolving complaints by cable systems, is applicable in this

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[6] 47 U.S.C. § 224 (b) and (c). Georgia has not certified that it regulates rates, terms and conditions of pole attachments. *See Public Notice*, "*States That Have Certified That They Regulate Pole Attachments*," 7 FCC Rcd 1498 (1992).

[7] 47 U.S.C. § 224 (b)(1).

[8] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration*, 4 FCC Rcd 468, 471 at ¶ 26 (1989).

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 224 (f) (1).

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at ¶ 1123 (1996), *on reconsideration*, 14 FCC Rcd 18049 (1999); *affirmed in part Southern Company v. FCC*, No. 99-15160 (11th Cir., released June 13, 2002).

[12] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 F.C.C. 2d 1585 (1978); *Second Report and Order*, 72 F.C.C. 2d 59 (1979); *Memorandum and Order*, 77 F.C.C. 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987). *See also, Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) and *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 (2000), *pet. for recon. denied in part, Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, FCC 01-170, 16 FCC Rcd 12103 (2001), *appeal pending sub nom. Southern Company Services, Inc. et al. v. FCC*, Case No. 01-1326 (D.C. Cir., filed July 26, 2001).

[13] *See* 47 C.F.R. § 1.1409 (e)(1).

case.[14] The Cable Formula allocates the cost of the entire pole by the percentage of usable space occupied by the attachment. The Cable Formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission. The *1987 Pole Attachment Order*[15] provided a Cable Formula for local exchange carrier ("LEC") utilities using the Commission's Part 31 regulatory accounts.[16] At that time, a LEC reported data collected in accordance with the Commission's Part 31 accounts on an FCC Form M. Effective January 1, 1988, Part 31 was replaced by Part 32, which changed how LECs account for and report certain costs.[17] The Commission's Annual Report Form M was revised on April 27, 1989 to reflect the new accounting system in Part 32.[18]

5. In 1990, the Common Carrier Bureau responded to a request for clarification concerning which Part 32 accounts should be used in place of the Part 31 accounts in the Cable Formula. The Common Carrier Bureau released a guidance letter concerning the use of Part 32 accounts in the Cable Formula.[19] In 1995, the Common Carrier Bureau provided further guidance concerning which Part 32 accounts should be included in the Cable Formula in a hearing designation order, *UACC Midwest, Inc., et al. v. South Central Bell Telephone Company*[20] ("1995 Order").[21] In the *2000 Pole Attachment Order*,[22] the Commission formalized and clarified the Part 32 accounts to be used in the Cable Formula for LEC utilities, acknowledging that an exact tracking of expenses from Part 31 accounts to Part 32 accounts was not possible.[23] LECs now maintain their Part 32 accounts and file their annual operating costs with the

[14] The Cable Formula applies to attachments made by cable systems and telecommunications carriers providing telecommunications services until February 8, 2001. Beginning February 8, 2001, it applies only to cable system attachments. *See Amendment of Rules and Policies Governing Pole Attachments*, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

[15] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, 2 FCC Rcd 4387 (1987) ("*1987 Pole Attachment Order*").

[16] *1987 Pole Attachment Order,* 2 FCC Rcd 4387, 4402-03, Appendix B (1987).

[17] *See Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, 43 of the FCC's Rules), Report and Order*, FCC 86-221, 60 Rad. Reg. 2d 1111 (1986); *on reconsideration,* 2 FCC Rcd 1086 (1987).

[18] *Revision of Annual Report Form M*, DA 89-503, 4 FCC Rcd 4879 (1989); *erratum* DA 89-519, 4 FCC Rcd 4565 (1989).

[19] Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (CCB 1990).

[20] *UACC Midwest, Inc., et al. v. South Central Bell Telephone Company*, DA 95-1363, 10 FCC Rcd 10905 (CCB 1995).

[21] *See also Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Company*, FCC 96-362, 11 FCC Rcd 11202 (1996).

[22] *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 (2000), *on reconsideration,* FCC 01-170, 16 FCC Rcd 12103 (2001), *appeal pending sub nom. Southern Company Services, Inc. et al. v. FCC*, Case No. 01-1326 (D.C. Cir., filed July 26, 2001) ("*2000 Pole Attachment Order*").

[23] *Id*. at ¶ 45.

Commission's Automated Reporting and Management Information System ("ARMIS").[24] ARMIS Report 43-02 - Uniform System of Accounts contains the financial information necessary to calculate pole attachments rates.[25] In this case, we apply the rules as they existed at the time the Complaint was filed ("1998 Cable Formula"), because the Commission had not yet adopted the final rule clarifying the specific Part 32 accounts to be included in the Cable Formula.[26]

6. In October 1997, BellSouth notified CTAG that it was increasing its annual pole attachment rate to $5.03 per pole beginning January 1, 1998. In its Complaint, CTAG claims that the $5.03 rate exceeds the maximum permitted rate calculated using the 1998 Cable Formula. Using the 1998 Cable Formula, and relying on the public information reported annually by BellSouth to the Commission, CTAG calculates an annual pole attachment rate of $4.27.[27] CTAG also argues that the new rate of $5.03 violates the nondiscrimination clause of the Pole Attachment Act because is exceeds the $4.20 annual pole attachment rate that BellSouth charges certain competitive local exchange carriers ("CLECs") that are attached to its poles.

7. In its Response, BellSouth first argues that additional accounts should be included in calculating the maximum rate. Specifically, BellSouth seeks to include Accounts 6124[28] and 6535[29] in the administrative component of the formula. Although the Commission has since clarified that these specific accounts are not to be included in the Cable Formula,[30] at that time the standard for including those accounts was detailed in the 1995 Order. In the 1995 Order, the Common Carrier Bureau stated that portions of either of these Part 32 accounts could be included in the administrative component of the rate calculation if those portions would have been includable in the rate calculation when using Part 31 accounts. In the 1995 Order, the utility was directed to analyze the accounts in order to make that determination and to support its conclusions by affidavit. In its Response, BellSouth admits that under the Part 31 scheme, amounts that might now be included in Accounts 6124 and 6535 were booked to pole expense based on monthly usage or engineering time data. However, BellSouth makes no attempt to identify a portion of these accounts that might have been includable as pole expense under the Part 31 scheme. Instead, BellSouth argues that the entire accounts should be included.[31] We find that BellSouth

[24] *Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules)*, CC Docket No. 86-182, 2 FCC Rcd 5770 (1987), *modified on recon*., 3 FCC Rcd 6375 (1988).

[25] The ARMIS 43-02 Report provides the annual operating results of the carriers' telecommunications operations for every account in Part 32. *See* 47 C.F.R. Part 32.

[26] We note that CTAG calculated a rate of $4.27 using the 1998 Cable Formula. Using the same public records that CTAG used, our current Cable Formula would yield a rate of $4.25.

[27] In its Reply, CTAG recalculated its rate with an additional amount added to the administrative component based on BellSouth's Response. This addition did not change the $4.27 rate.

[28] 47 C.F.R. § 32.6124 (General purpose computers expense).

[29] 47 C.F.R. § 32.6535 (Engineering expense).

[30] *See 2000 Pole Attachment Order* at ¶¶ 45-52.

[31] In support of its argument, BellSouth cites to the Commission's *Notice of Proposed Rulemaking*, 12 FCC Rcd 7449 (1997). However, the proposed rules in the *Notice* were not adopted by the Commission and, in fact, Accounts (continued.…)

has not met its burden to identify and substantiate any portion of these two accounts that might have been included under the Part 31 scheme. Therefore, we find CTAG's exclusion of these accounts from the administrative component of the 1998 Cable Formula to be reasonable.

8. BellSouth next asserts that it should be able to generate a state-level rate rather than the company-level rate calculated by CTAG. BellSouth seeks to rely on internally generated data for certain accounts rather than the publicly available and independently verifiable company-level data reported to ARMIS. Specifically, in this case, public reports are not available for state-level pole investment related accumulated depreciation (Account 3100) and accumulated deferred taxes (Account 4340) and certain state-level expenses (*e.g.*, rents and benefits) included in Account 6411. BellSouth argues that internally generated reports are sufficiently reliable for use in developing a state-level pole attachment rate provided the internal values are reconciled with company-level data made publicly available in BellSouth's ARMIS reports. BellSouth's Response incorporates the affidavit of William J. P. Tyler ("Tyler Affidavit") to justify its rate calculation.[32]

9. CTAG objects to BellSouth's use of state-level data because it is not publicly filed and subject to regulatory review and analysis for purposes other than pole attachments. CTAG also points out that internal data is not available for pre-complaint negotiation because it is not part of ARMIS or otherwise publicly available.

10. To determine a just and reasonable pole attachment rate, Congress directed the Commission to institute an expeditious program "which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[33] To that end, Congress noted that although there may be some difficulty in determining the components of the operating expenses and actual capital costs of the utility, special accounting measures or studies should not be necessary since the majority of the cost and expense items attributable to the utility pole plant are already established and reported to various regulatory bodies and therefore the information is already a matter of public record.[34] The Commission has stated, "we expect to continue to use a methodology which utilizes publicly available data, does not require ratemaking proceedings, and lends itself to an expeditious resolution of disputes. It is our intent to conform to the will of Congress and to avoid protracted proceedings, special studies, or submissions of internal corporate data to the maximum extent possible."[35]

(…continued from previous page)
6124 and 6535 were specifically excluded from the Cable Formula calculation by the Commission in the *2000 Pole Attachment Order*.

[32] Response at pp. 2-11, referencing Affidavit of William J.P. Tyler ("Tyler Affidavit").

[33] *See S. Rep. No*. 95-580, 95th Cong., 1st Sess. at 21 (1977).

[34] *Id.* at 19-20.

[35] *Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,* CC Dkt. No. 86-212, FCC 86-274 (*released* June 6, 1986).

11. The Commission has expressed a preference for using publicly available data to calculate the maximum pole attachment rate.[36] In *Television Cable Service, Inc. v. Monongahela Power Co.*,[37] the Commission expressed its preference for "data developed for regulatory purposes."[38] Nevertheless, we do not require that only publicly available data be used. The provisions in the rules requiring utilities to provide data to attachers anticipate that some data may be available only from the utility. However, in complaint proceedings, where the Commission may take notice of information in publicly available filings made by the parties, it is our practice "in the absence of supported carrying charges . . . to use the figure from publicly available information."[39]

12. The methodology used to arrive at a pole attachment rate should be simple and based on publicly identifiable and verifiable data whenever it is available.[40] Section 1.1404(g) of the Commission's rules describes the requirements for the submission of data.[41] It states that data and information should be based upon historical or original cost methodology. Data should be derived from ARMIS, FERC 1,[42] or other reports filed with state or federal regulatory agencies. Calculations made in connection with figures should also be submitted. Section 1.1409(a) of the Commission's rules[43] also provides that publicly available data may be relied upon by the Commission when insufficient data is available in the record upon which to base its determination.

13. BellSouth's reliance on *Teleprompter v. Southern Bell*, [44] is misplaced. In that case, the Common Carrier Bureau accepted state-wide data in lieu of company-wide data but did not comment on whether the state-wide data was publicly filed. In addition, the state-wide data lowered the carrying charge rate component of the formula. As the Commission stated in *Teleprompter v. C&P Telephone*[45] the Commission's formula methodology "passes the test of reasonableness under the circumstances: it

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[36] *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 at ¶¶ 37, 47, and 52 (1987).

[37] *Television Cable Services, Inc. v. Monongahela Power Co.*, 88 F.C.C. 2d 63 (CCB 1981), *modified in part*, FCC 81-488, 88 F.C.C. 2d 56 (1981).

[38] *Id.* at ¶ 20.

[39] *Teleprompter v. C&P of West Virginia*, FCC 80-372, 79 F.C.C. 2d 232 at ¶ 17 (1980). *See also Texas Cable and Telecommunications Association v. GTE Southwest Incorporated*, DA 99-348, 14 FCC Rcd 2975 at ¶¶ 26-29 (CSB 1999).

[40] *First Report and Order*, 68 FCC 2d 1585 (1978); *1987 Pole Attachment Order*, 2 FCC Rcd 4387 (1987).

[41] 47 C.F.R. §1.1404(g).

[42] Form 1 is the Annual Report that electric utilities file with the Federal Energy Regulatory Commission.

[43] 47 C.F.R. §1.1409(a).

[44] *Teleprompter Corp., et al. v. Southern Bell Tel. & Tel. Co*., 49 RR 2d 1428, 1430 (CCB 1981).

[45] *Teleprompter of Fairmont, Inc., et al. v. Chesapeake & Potomac Telephone Company of West Virginia*, FCC 81-32, 85 F.C.C. 2d 243 at ¶ 16 (1981).

employs publicly available figures; it is simple; and it includes the critical elements identified by Congress as part of annual carrying charges."[46]

14. In this case, BellSouth does not offer support for the data it presents. The Tyler Affidavit includes exhibits that list the individual states included in the company-level filing along with an amount for each state that when totaled equals the amount on the ARMIS report for a particular account. However, BellSouth provides no information about the basis it used to allocate costs from its aggregate company-level accounts to the various states. Neither does BellSouth provide any specific information about its data source for the specific amounts apportioned to each state. Many of BellSouth's attachments to its original Response are fairly illegible and some of BellSouth's figures are not reconciled to anything. Indeed, the Tyler Affidavit relies on alternative data as well as differing reporting time frames in its calculations, demonstrating the difficulty BellSouth itself had with acquiring internal data to use in the 1998 Cable Formula.

15. We find CTAG's reliance on the company-wide ARMIS data to be reasonable. In this case, calculation of the annual pole attachment rate using company-level data is efficient and expedient, publicly verifiable and represents an equitable portion of BellSouth's actual capital costs and operating expenses. BellSouth does not provide sufficient information or explanation of its proposed calculations to support its use of internally generated reports. Upon review of CTAG's amended calculation, we agree with CTAG's calculated rate of $4.27 using the 1998 Cable Formula. Therefore, we set the maximum permitted rate at $4.27 per annum per pole. We order BellSouth to refund to the CTAG members represented herein, any amount paid over the maximum just and reasonable per pole attachment rate of $4.27 for 1998, plus interest,[47] beginning April 1, 1998 (the date of the filing of the Complaint) or the date the individual CTAG member was added via supplemental filing.[48]

16. Finally, we address briefly CTAG's allegation that the rate of $5.03 is discriminatory and in violation of Section 224(f)(1) of the Pole Attachment Act. CTAG asserts that BellSouth charges CLEC attachers in Georgia an annual pole attachment rate of $4.20 per pole.[49] BellSouth responds that not all CLECs in Georgia pay a rate of $4.20 and the rate was set for a previous year, not 1998. Given our decision requiring BellSouth to lower its rate to $4.27, we need not reach the issue of whether the $5.03 rate constitutes discrimination in violation of the Pole Attachment Act.

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[46] *Id.* at ¶ 16.

[47] The Commission has determined previously that the appropriate rate of interest on the overcharges is the current interest rate for Federal tax refunds and additional tax payments. *See Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, FCC 80-372, 79 F.C.C. 2d 232 at ¶ 24 (1980), *order on recon.,* 85 F.C.C. 2d 243 (1981).

[48] *See* Attachment A of this Order for a list of the CTAG members and the dates they are eligible to receive refunds.

[49] Complaint at p. 3, referencing Complaint, Exhibit 6 (*Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n Docket 7061-U (October 21, 1997) at 64).

17. Accordingly, IT IS ORDERED, pursuant to Sections 0.111, 0.311 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1401-1.1414, that the Complaint IS GRANTED TO THE EXTENT INDICATED HEREIN.

18. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1410, that the annual pole attachment rate of $5.03, effective April 1, 1998, IS UNREASONABLE.

19. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1410, that the annual rate of $4.27 for 1998 for each pole attachment IS SUBSTITUTED for the rate of $5.03, effective upon the release of this Order.

20. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1410 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1410, that BellSouth SHALL REFUND to CTAG members, within thirty (30) days of the release of this Order, that portion of the amount paid in excess of the maximum permitted pole rate of $4.27, plus interest to the date of refund, for the period beginning April 1, 1998 or the date the individual CTAG member joined the Complaint as indicated in Attachment A, through December 31, 1998.

21. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 1.1401-1.1418 of the Commission's Rules, 47 C.F.R. §§ 0.111, 0.311 and 1.1401-1.1418, that CTAG and BellSouth SHALL NEGOTIATE IN GOOD FAITH, a maximum just and reasonable rate for the rates beginning in 1999, in accordance with the Commission’s rules.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

ATTACHMENT A

GROUP A (Refunds begin 4/01/98)
1. Brenmor Cable Partners, L.P., d/b/a InterMedia
2. Robin Media Grp., Inc. d/b/a/ InterMedia
3. Time Warner Cable
4. Insight Communications
5. TCI of Columbus
6. James Cable Partners
7. Cable Equities of CO., Ltd.

GROUP B (Refunds begin 4/23/98)
8. Comcast Communications, Inc.
9. Jones Communications of GA/SC, Inc.
10. Peachtree Cable TV, Inc.
11. Charter Communications, L.P.
12. Charter Communications II, L.P.
13. Falcon Cablevision

GROUP C (Refunds begin 4/29/98)
14. Cox Cable of Middle GA

GROUP D (Refunds begin 5/21/98)
15. Wometco CA TV of GA (& various Wometco CATV systems: Clayton Co., Cobb Co., Rockdale Co., Fulton Co., Fayette Co.)
16. Media One, Inc. (various systems)

GROUP E (Refunds begin10/22/98)
17. Northland Cable Properties Seven L.P.
18. Northland Cable Properties Eight L.P.

GROUP F (Refunds begin 3/04/99)
19. InterMedia Partners (Peachtree City, GA) (Note: Brenmor Cable Partners, L.P. and Robin Media Group, Inc. filed on April 1, 1998)