

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 93-087

October 18, 1993

PUBLIC UTILITIES COMMISSION
Re: Proposed Amendment to
Chapter 88, Attachments to
Joint-Use Utility Poles;
Determination and Allocation
of Costs; Procedure (Chapter 880)

ORDER ADOPTING RULE
POLICY AND BASIS
STATEMENT

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MAINE PUBLIC
UTILITY COMMISSION

WELCH, Chairman; PAINE and NUGENT, Commissioners

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I. PROCEDURAL HISTORY; INTRODUCTION

On May 13, 1993, the Commission commenced a rulemaking for the purpose of amending Chapter 88 of our rules. The proposed amendments expanded Chapter 88 to include a formula for the determination of the costs of utility poles that are jointly used by electric utilities, telephone utilities and cable television systems and the assignment and allocation of those costs among joint-users. The rulemaking was undertaken in response to a legislative directive to:

. . . adopt a rule governing the resolution of pole attachment rate disputes. The commission shall consider various formulas, including, but not limited to, the formula adopted by the Federal Communications Commission as codified in 47 Code of Federal Regulations, Part 1, Subpart J, as amended.

35-A M.R.S.A. § 711(4).

The Commission held a hearing on June 3, 1993. Twenty-four persons offered comments at the hearing. These persons, and their organizations, were:

<u>Witness</u>	<u>Representing</u>
Brian Gray	Bangor Hydro-Electric Company ("BHE")
Andrew Landry, Esq.	BHE
Kenneth Thompson	Cable Television of the Kennebunks; Poleworks
Steven Garwood	Central Maine Power Company ("CMP")
William Keefe	CMP
Lawrence Ralph, Esq.	CMP
Jeff Wood	CMP
Lauren Andrews	House Majority Office, for Rep. George Kerr
Sen. Charles Summers	Joint Standing Committee on Taxation
Rep. David Cashman	Joint Standing Committee on Utilities
Bruce Reeves	Maine Citizens Committee for Utility Rate Reform ("MCCURR")
Stuart McDaniel	New England Cable Television Association ("NECTA")
Thomas Steel	NECTA
Donald Boecke, Esq.	New England Telephone Company ("NET")
Timothy Hutchison	Pine Tree Telephone and Telegraph Company ("Pine Tree")
Veronica MacPhee	Pine Tree
Jerome Ramsey	Public Cable Television

Rob Sousa	Saco River Telegraph and Telephone Company and TAM
Virgil Bozeman	Senate Majority Leader's Office, for Senate Majority Leader Don Esty
John Lightbody, Esq.	Telephone Association of Maine ("TAM")
Owen Hannigan	United Cable Television
Reggie Palmer	West Penobscot Telephone Company and TAM

Eleven persons filed comments on or before June 14, 1993, and several comments were filed after that date. Comments were filed by:

Bangor Hydro-Electric Company
Senator Jeffrey H. Butland
Central Maine Power Company
Community Service Telephone
W.R. Jackson, Jr.
New England Cable Television Association
New England Telephone Company
Pine Tree Telephone and Telegraph Company
Office of the Public Advocate
Kenneth R. Thompson (for Cable TV of the Kennebunks, Communications Specialists of Maine, and Poleworks)
State Cable TV
Telephone Association of Maine

The testimony and comments in this case were excellent and informative. Many of the commenters were also prompt and helpful in responding to requests by the Staff for additional information following the filing of comments, and between our first deliberations on this rule, on June 21, 1993, and our second deliberation on June 30, 1993. After considering that testimony and comments, we proposed to adopt numerous changes to the proposed rule. Pursuant to 5 M.R.S.A. § 8052(5)(B), we requested further comment on those changes.

5 M.R.S.A. § 8052(5)(B) states:

If an agency determines that a rule which it intends to adopt will be substantially different from the proposed rule, it shall request comments from the public concerning the changes from the proposed rule. The agency may not adopt the rule for a period of 30 days from the date comments are requested pursuant to this paragraph. Notice of the request for comments shall be

published by the Secretary of State in the same manner as notice for proposed or adopted rules.

We determined that some of the proposed changes might be characterized as "substantial." We therefore permitted additional comments until August 16, 1993. Comments during this second comment period were received from Bangor Hydro-Electric Company, Central Maine Power Company, New England Cable Television Association ("NECTA"), New England Telephone Company, and Telephone Association of Maine ("TAM").

Despite the proposed changes that were described in the Order Permitting Further Comment, we adhered to three general policies: (1) that there is a group of costs associated with the provision of joint-use utility poles which should be assigned to or allocated among their users; (2) that space needed on utility poles for the attachment of circuitry or cables should be assigned to each user directly; and (3) that the remaining, commonly-used space on utility poles should be allocated in a reasonable manner among the users.

We describe the various changes from the originally proposed rule below. To distinguish between our two proposals, we refer to the proposed rule issued on May 13, 1993 as the "Proposed Rule." The proposal that was issued on July 7, 1993 was referred to at that time, and will be described in this Order, as the "Intended Rule." Comments addressing the Proposed Rule will in some instances be called "first round comments." Comments addressing the Intended Rule will in some instances be called "second round comments."¹

In general, the sections of the Intended Rule that are not discussed below are unchanged from the Proposed Rule. Discussion of these provisions may be found in the Notice of Rulemaking issued on May 13, 1993. Although not discussed independently, several subsections in Section 1 (Definitions) have been changed to conform with changes in other sections of the rule that are discussed below.

II. SECTION 2: APPLICABILITY

CMP and TAM argued in first round comments that the rule should not state that it would apply in instances other than a proceeding under 35-A M.R.S.A. § 711. The Notice of Rulemaking specifically mentioned utility rate cases in which

¹When an agency issues a revision for further comment under the provisions of 5 M.R.S.A. § 8052(b), only "comments concerning the changes from the proposed rule" are permitted.

a party might argue that a utility was not receiving sufficient revenue from another utility or from a cable television system. CMP argued that the Commission has no authority under 35-A M.R.S.A. § 711, in the absence of a disagreement about a pole attachment rate, to "force" attachers "to conform their agreement to the Rule." TAM made the same argument. Both argue that the existing CMP-TAM pole attachment agreement should not be disturbed by the Rule.

The Commission has the duty under 35-A M.R.S.A. § 301 to require just and reasonable utility rates. Its authority in this Rule to ensure that ratepayers are not harmed, as a result of inadequate revenues from other attachers for the use of a utility's valuable joint-use poles, would be based on that section, not on section 711. (Section 301 was cited as part of the Commission's "Statutory Authority" at the end of the Proposed Rule.) CMP and TAM seem to lose sight of the fact that the CMP-TAM agreement they seek to preserve came about in part as a result of action by the Commission in a CMP rate case which questioned the adequacy of CMP's pole attachment revenues from the independent telephone companies.

Nevertheless, we agree that the Rule will not state specifically that it will be applied in "other," e.g., rate, proceedings. The reference to other proceedings was deleted from the Intended Rule. No second round comments were received on this issue. The rule will therefore provide a result only in the case of a dispute between utilities or between a utility and a cable television system under 35-A M.R.S.A. § 711. If an issue is raised in a utility rate case concerning the adequacy of revenues from an attacher, we will decide at that time what policies will be applied to the issue.

In two orders in the pending case of Cable Television Companies v. Central Maine Power Company, Docket No. 93-030, we had ruled that the cost of service and allocation provisions of this rule will govern those issues in that proceeding. However, we have decided that the rule will have prospective effect only and will not necessarily govern recovery for periods prior to its effective date, although parties may argue for such a result. In the Intended Rule, Section 2 reflected that decision. In order that all rules concerning retroactivity are stated together, that portion of Section 2 has been transferred to § 13(A). The issues concerning retroactive application of Commission orders are discussed under Part X (§ 13) below.

III. SECTION 3: OVERVIEW OF SECTIONS 4, 5, 6 AND 7

Section 3 was not included in the Proposed Rule and was added to the Intended Rule. It provides a summary overview of Sections 4-7, which contain the heart of the ratesetting and separate charge portions of the Rule.

IV. SECTIONS 4 AND 7: COSTS TO BE INCLUDED IN AND EXCLUDED FROM RATE; SEPARATE CHARGES

A. Poles Included for Rate Calculation

Several witnesses and commenters, including CMP, TAM, Pine Tree, and NECTA, argued in their initial comments that various costs that the Proposed Rule would have included in the joint-use revenue requirement or cost of service calculation for joint-use poles should not be included in that calculation. These commenters argued that those costs should instead be borne separately, either by the owner of the pole or, through separate charges, the beneficiaries of the activity. To some extent, these witnesses and commenters argued that changing the status quo was inconvenient. Other more important reasons were also articulated. Particularly in the case of investments (as opposed to expenses), changes from current practice may result in under-recovery or over-recovery, or in intergenerational inequity.

As discussed below, we have decided that several of these costs should not be part of the pole attachment rate (under Sections 4, 5, and 6) but should instead be subject to separate charges under Section 7.

One of these decisions requires an examination of the pole heights that ought to be used to calculate the pole attachment rate itself. Current practice under existing contracts (between utilities and between the utilities and cable television systems) is to include only the investment in standard (35-foot) poles in the cost of service calculation from which the pole attachment rate is derived. The cost of the "excess height" portion of poles that are taller than 35 feet is borne by the attacher(s) requiring the excess height. Because excess height has been separately paid for, inclusion of all the costs of all joint-use poles in the investment base (as originally proposed) would require attachers to pay for investment that had already been paid for and would result in intergenerational inequity. For this reason, under Section 4(B), only a utility's investment in 30 and 35 foot poles is used as a basis for calculating the pole attachment rate. As explained below, the per-pole rate that is ultimately calculated will be applied to all jointly-used poles of all heights.

In its second round comment, CMP stated that § 4(D) of the rule could be read to exclude all of a utility's investment in poles taller than 35 feet from "the rate base." CMP states that it believes the Commission "intended . . . to include all electric utility poles in the pole attachment rate base, but only to the extent of the utility's average per pole investment for 30 and 35-foot poles," i.e., on poles that are taller than 35 feet, effectively only the portions that are in excess of 35 feet would be excluded. CMP of course agrees that those portions of taller

poles which are in excess of 35 feet should be excluded because of the separate "excess height" provisions in its contracts and in Section 7 of the Rule.

CMP's use of the term "rate base" in this context is somewhat confusing. In fact, the rule does require the utility to calculate the rate for pole attachments based only on its investment in 30 and 35-foot poles (§§ 4(B), 4(D)(1) and 4(D)(2)). This approach provides a reasonable surrogate for the utility's investment per pole in either a "standard" (30 and 35-foot) pole or the 35-foot portion of a taller pole. The rate is then applied to all of the utility's poles, including those taller than 35 feet. Thus, in effect, all standard poles and the "standard" portion of taller poles constitute the "rate base." The application of the rate to all poles is stated clearly in Section 3 and was stated (in the intended Rule) somewhat less clearly in Section 6(A). The latter provision has now been clarified.

The alternative approach, apparently favored by CMP, would include all poles in the rate calculation process, but, for the poles taller than 35 feet, would attempt to exclude that portion of the cost attributable to the portions of poles that exceed 35 feet. The end result of both that approach and the approach in the Rule should be substantially the same. However, calculation of the alternative approach would likely be far more complicated.

TAM's second round comment pointed out correctly that the Rule requires a utility to calculate its investment in all 30 and 35-foot poles and not its investment in only joint-use 30 and 35-foot poles. The latter category would, of course, be more precise. The Proposed Rule had limited the category to investment in joint-use poles rather than all poles, but data responses from CMP, BHE and NET stated that they were unable to separate this investment. TAM argues that most 30-foot electric utility poles are "stub poles" or "intermediate poles providing service directly to a house, both of which will generally be available for joint-use" (emphasis added), but claims on the other hand that independent telephone company (ITC) 30-foot poles are almost exclusively sole-use. There is no record support for either of these propositions. TAM proposes to exclude investment in sole-use 30-foot poles, but provides no indication that the independent telephone companies' accounting systems would make feasible the separation in their investment that CMP, BHE and NET cannot do. We doubt if any possible gain in precision would outweigh the increased burden and will therefore not change the Intended Rule in this respect.

B. Excess Height and Make-Ready Work

In the Intended Rule, for the reason described in Part IV.A. above, we proposed that excess height should be treated in the same manner as under present practice. Consistent with all comments on this specific issue, Section

4(D)(1)(a) excludes investments in poles taller than 35 feet. Section 7 requires payment for the excess height portion of taller poles in a manner consistent with the current practice. No commenter in the second round opposed this change.

Several commenters and witnesses argued that make-ready charges should also be separate from the pole attachment rates, as under existing agreements, because that method assigns the cost specifically to the cost causer. CMP stated that if make-ready costs were to be included in the rate, the calculation from numerous work orders would be difficult. NECTA, Pine Tree Telephone and Mr. Thompson of Cable Television of the Kennebunks and Poleworks made intergenerational equity arguments that CATV operators had already paid for previous make-ready charges. The Proposed Rule would not have required charging for previously paid-for make-ready costs, although, in calculating a pole attachment rate, prior costs could certainly serve as a basis for determining future costs. Nevertheless, Mr. Thompson pointed out that his was a "mature" system, that it did not presently incur many make-ready charges and that paying for an average amount of these costs in a pole attachment rate would be unfair.

In its first comment, CMP suggested some specific policies concerning make-ready work charges. We have adopted much of CMP's approach in a generalized form in Section 7(A). CMP did not object to this provision in its second comment.

Commenters also argued that the existing excess height system, with its use of separate charges for make-ready work, promotes efficiency. Potential causers of these costs are less likely to place unnecessary orders for taller poles or for make-ready work if they are charged directly for those costs than if the costs are bundled into a rate which is subject to allocation among all attachers.

We accept these arguments. Therefore, both excess height investment and make-ready work have been excluded from the cost of service calculation that is required by Section 4. Both of these costs are instead subject to separate charges under Section 7 and must be assigned or allocated pursuant to rules stated in that section.

The provision governing make-ready charges does reject an approach that is contained in existing contracts between NET, CMP and the cable companies. Under Part VIII(D) of a contract claimed by NECTA to be "representative," the cable company must pay a make-ready charge if it requires space and the utility (usually the telephone utility) must move its lines to make space. This policy makes sense and is incorporated in Section 7(A). However, under Part VIII(E) of the same contract, if a utility subsequently requires more space, and the cable company's existing cable must be moved, the cable company

must perform or pay for that movement. Section 7(A) rejects that policy by stating that the user requiring additional space is presumed to be responsible for the cost.

In its first comment, NECTA states that under current excess height agreements, when an existing pole that is too short is replaced, the cable company must pay for the "excess height" portion of the costs of the replacement pole. In addition, it must pay for the remaining value of the replaced, partially depreciated pole. However, the remaining value is calculated by using a replacement pole (of standard height), multiplied by the percentage of the remaining life of the actually replaced pole.

NECTA does not argue specifically that its payment for the replaced pole should be based on some other amount, e.g., net book value. Instead, NECTA uses this provision in support of its argument that the cable companies should be charged less than other attachers because they have "already paid" the high marginal cost for so many excess height poles. CMP, at least, has stated that CATV companies seldom are charged for excess height poles. Even NECTA, elsewhere in its comment, states "Any pole height in excess of the standard pole is typically not attributable to the CATV, which uses a mere 1 ft. of space."

We consider here only the issue of what amount the attacher(s) requiring excess height should pay for the pole that has been replaced. On balance, we believe that the better answer is net book value (i.e., depreciated original book value). Section 7(C) states that policy for attachment relationships that are governed by the Rule.

We recognize that both positions have some merit. When a partially depreciated pole is replaced with a new pole, the rate base (and rates) of the owning utility must be increased. The existing contract attempts to compensate the utility for at least a portion of that burden. On the other hand, the direct loss to the owning utility is only equal to the net book value of the replaced pole. Utility pricing is generally based on net book value, and some of the increase to rate base will be paid for by other attachers through pole attachment rates.

C. Tree Trimming and Brush Control

Several commenters argued that tree trimming and brush control should not be included in the common group of costs subject to allocation under § 4. As in the case of excess height and make-ready work, we agree that the costs for tree trimming and brush control should not be part of the pole attachment rate, and should be passed on to other attachers only as separate charges under Section 7(B). However, only tree trimming and brush control that provides a mutual benefit should be passed on at all.

It seems reasonably clear that tree trimming performed by or for telephone utilities benefits cable television attachers almost equally. Pine Tree Telephone suggested a 50/50 allocation of telephone utility-incurred tree trimming costs with cable companies. Cable attachments are in close proximity to telephone attachments, but they do typically use less space. The Intended Rule therefore proposed to allocate 40% of telephone company tree trimming costs to cable companies. We received no second round comments on this issue and that provision is adopted.

Based on several comments, the Intended Rule also proposed, however, that tree trimming required for electric lines must be borne by the electric utility. The much larger electric utility clearing "profile" suggests that much of the electric utility trimming may not benefit communications attachers at all. NECTA and other commenters argued that because of shielded cable, branches can even grow in between telephone and CATV without interfering with service.

CMP argued, however, that the communications attachers (telephone and CATV) benefit from the trimming done by the electric utility in that branches that are not trimmed can fall down onto telephone and CATV wires. CMP is correct that communications attachers may receive some benefit from some portion of the electric utility's trimming. It states no basis, however, for its "best estimate" that 50% of its tree trimming benefits "in some way" other attachers, nor is there any quantification of the "in some way" portion of this claim.

CMP has also argued that when a tree falls it usually severs all lines. The primary issue is branches, however, not whole trees, and branches likely affect the top attacher more. BHE admits that electric utilities "require a greater amount of tree trimming because they are more concerned with the trees merely touching their conductors than are telephone and CATV users" In addition, some of the protection to the communications attachments may come from the electric conductors themselves, as those conductors often break or even arrest the fall of a branch. All of these reasons suggest that the benefit to communications attachers may be only a small proportion of the total cost of electric utility trimming and that the proportion is very difficult to quantify.

Nevertheless, in its second round comment, Bangor Hydro argued that electric utilities should be allowed to prove the benefit. Since we recognize that there is some benefit, the final rule is amended to include a provision that does allow such proof. However, it also requires "reasonable quantification" of the benefit.

CMP argued that brush control benefits all attachers by preventing brush from becoming trees and branches. We agree that such a benefit is likely.

Section 7(B) of the final rule applies to both tree trimming and brush control. Thus, cable companies must pay 40% of telephone company costs. In other cases, the entity performing brush control may prove the extent of the benefit to other attachers.

D. Guy and Anchor Investment

The Intended Rule (§ 4(D)(1)) proposed to treat investments in guys, anchors and other similar supporting equipment differently from that proposed in the original Proposed Rule. The Proposed Rule would have included all investment in guys and anchors in a general cost of service calculation. Guys, anchors and other supporting equipment are usually needed on corners and curves in order to counteract the effect of the force toward the inside of the curve by the wire attachments. However, electric utilities place their own guys to balance the load from electric conductors and telephone utilities place separate guys to balance telephone cables. Typically, these guys will run from a common anchor to a point on the pole near the utility's conductors or circuitry. Based on responses to a data request issued to many of the commenters, it is likely that electric utilities receive relatively little direct benefit from telephone company guys and vice versa.

It is also likely, however, that cable television companies receive a substantial direct benefit from telephone guys because of the proximity of telephone and CATV attachments. If a pole has only an electric utility attachment and no telephone company attachment, and a cable television system wishes to attach, CMP requires a guy for the cable television system. (The cable companies confirm this practice, although Bangor Hydro-Electric Company states that it generally does not require a guy for a cable television attachment in those circumstances.) Conversely, if there are existing guys for both electric and telephone attachments, a separate guy for the CATV attachment is seldom required. As noted above, the proportion of telephone guys and anchors which have a mutual benefit to electric utilities is relatively low. Therefore, the Intended Rule requires telephone utilities to establish separate costs of service and pole attachment rates for cable companies and for electric utilities based on the different amounts of their investment in guys, anchors and other supporting equipment that mutually benefit cable television companies and that have a mutual benefit to electric utilities.

By contrast, the provision addressing the investment which may be included by an electric utility groups together investment which is "reasonably attributable to mutual use by both the electric utility and the telephone utility, by both the electric utility and the cable television system, or by all three attachers." In its second round comment, NECTA states that this provision means that it must pay for a portion of some investment which is mutually beneficial only to the

electric and telephone utilities and not to the CATV system. NECTA is technically correct, but, as discussed above, very little of this equipment determined to mutually benefit both the electric utility and the telephone utility will not also benefit the cable system. It is also possible that there are some offsetting instances in which a telephone utility may pay for some portion of the investment which is mutually beneficial only to the electric utility and the cable company. The difficulty of sorting all this investment out into three separate subcategories would appear to far outweigh any benefit.

In all cases, a utility must establish the proportion of its guys and anchors that benefit another attacher. For example, a study performed in 1982 by CMP shows that 12% of the guys and about 25% of its anchors were determined to be mutually used by CMP and the independent telephone companies (ITCs) in their common service territories. In its second comment, CMP proposed that this survey should become the stated allocation in the Rule, arguing that proving the proportion of the guys and anchors which are "reasonably attributable to mutual use" will require lengthy litigation. (We assume that CMP has not proposed that this proportion should apply to the much larger portion of telephone guying which has a mutual benefit for CATV systems.) In the absence of a showing that the CMP survey, which is limited to ITC territory, is universally applicable, even to electric utilities, the issue should be left to proof in each case. There is no reason why survey information cannot be used in litigation if it can be shown to be reasonably reliable.

Finally, NECTA argues that it already pays for guys through "make-ready work." In the first place, this argument does not appear to address those guys that are under discussion here, i.e., those which have been determined to be mutually beneficial. Most likely, the guys which are paid for by "make-ready" charges are not mutually-used but are sole-use supports for the CATV attachment. All sole-use supporting equipment is expressly excluded from the rate calculation under Section 4(B)(2)(b). Moreover, the cable companies state that they usually put up the guys themselves. Nevertheless, if a cable company pays all or part of the cost to the utility to place a mutual-use guy, that amount should not find its way into the revenue requirement. Section 4(D)(2)(d) of the Intended Rule stated that contributions in aid of construction from customers must be excluded from the investment used to calculate the amount of investment in "standard" (30 and 35-foot) poles. It is now expanded to include contributions from "other attachers."

E. Accounting for Contributions-in-Aid-of-Construction and Line Extension Support Charges

Section 4(D)(2)(d) requires utilities to exclude contributions-in-aid-of-construction in poles from the investment quantity which serves as the basis for

the rate. (This provision is also discussed above in Part IV.D., in connection with contributions from other attachers.) In its first comment, BHE stated that it would reduce the amounts of its pole accounts by the contributed amounts, but would charge the ultimate pole attachment rate to all poles, including those which were wholly or partially contributed. We agree that this approach is correct, as the average per-pole investment, and therefore the pole attachment rate itself is reduced to reflect the average contributed amount per pole.

In its first comment NET argued that this provision should be deleted as "superfluous," or at least not applied to NET, because it already accounted for contributions in this manner. This provision simply requires utilities to account, or continue to account, for contributions in the manner stated, whether they do so presently or not.

Incidentally, it should be clear that the only contributions which should be deducted are those for poles themselves and mutually-used guys, anchors and other supporting equipment. No contributed investment in circuitry or conductors should be excluded pursuant to this provision which, by its terms, is limited to poles and supporting equipment. All circuitry and conductor investments (contributed or utility) must be excluded in any case under Section 4(D)(2)(c), and no double exclusion is intended.

Section 4(F)(4) states that utilities shall deduct from their joint-use pole revenue requirement those revenues that it receives as "support charges" from line extension customers. In its first comment, NET proposed that this provision be deleted, arguing that it was already covered by § 4(D)(2)(d), the contribution provision discussed above. In making a contribution-in-aid of construction, a customer provides an investment the utility would otherwise provide. By contrast, a support charge supplies the annual revenue requirement (or carrying charge) for investment that the utility itself makes, e.g., in a line extension. Thus, there is a significant accounting difference between these two methods of individual customer financing of line extensions. A contribution affects a utility's balance sheet and a support charge affects its income statement. NET does not include the use of support charges in its line extension terms and conditions, but the three largest electric utilities in the state use both methods.

F. Cost of Equity Issues

In its second comment NET opposes the provision (Section 4(E)(1) requiring the Commission to determine an "interim cost of equity" if a utility's last rate proceeding was more than five years ago. NET claims that the "latest authorized return is entirely non-controversial" and the fact that no one has undertaken to change it "indicates that it is representative." NET made a similar

comment in its first comments. We find that five years is a sufficiently long time to place the cost of equity in issue. That no one has undertaken to change a utility's rates does not establish that the last-established return on equity remains valid. It may only establish that the utility is neither overearning nor underearning some currently assumed cost of equity. Obviously, a party will be free to argue that the latest authorized return remains "representative."

NECTA suggests that if the Commission may rely on general rate proceedings for comparable utilities to establish an "interim cost of equity," it should be able to do the same for the cost of debt. It is not necessary to have such a provision, as an updated embedded cost of debt may readily be calculated for any utility.

G. Section 4(C): Determination of Amounts of Investments, Expenses and Revenues

Little cost information exists which applies exclusively to joint-use poles. Subsection 4(C) (originally Section 3(E)) allows a utility to use more generalized costs, e.g., for all poles of the relevant heights, and appropriate ratios or sampling, in order to calculate reasonably accurate costs for joint-use poles. Based in part on suggestions by CMP in its first comment, this subsection has been expanded and made more specific as to the type of information that may be used in determining the cost of service for joint-use utility poles.

H. Level of Costs

Both NECTA and Kenneth Thompson of Cable Television of the Kennebunks and Poleworks have suggested that the utilities' joint pole costs are higher than they should be, that there is no incentive for the utilities to reduce their costs, and that this Rule should address that problem. Both Pine Tree Telephone and TAM claim that independent telephone companies can provide poles far more cheaply than CMP. NECTA and Mr. Thompson propose no particular solution to the problem beyond a suggestion that the utilities should be required to sell poles to private entities such as Mr. Thompson's Company, Poleworks. (This proposal would at best address high operating costs, not high capital costs.) We doubt if the Commission has authority under 35-A M.R.S.A. § 711 or otherwise to order a utility to sell its utility property to a non-utility entity.

The Commission is actively considering incentive proposals to promote utility efficiency in both the current CMP base rate proceeding, Docket No. 92-345, and the current NET rate design case, Docket No. 92-130. The issue, while important and possibly of great value, is not reasonably within the scope of the present rulemaking.

V. SECTION 5: ASSIGNMENT AND ALLOCATION AMONG JOINT USERS OF JOINT-USE UTILITY POLE COSTS

A. Section 5(C): Assignment of Attached Space

1. Standard Pole Heights

The Proposed Rule would have required parties to establish the average height of joint-use poles or to agree upon a hypothetical average 37-foot pole (based on the approximate mix of 35 and 40-foot poles) for the purpose of assigning attached space and allocating common space. CMP and BHE supported using 37-foot poles for allocation purposes as this average took into account poles of all heights. Several commenters objected that there were no 37-foot poles (or poles of any other average height). They also argued that because, under present contracts, the costs for heights in excess of 35 feet are paid for by (and, therefore, essentially "assigned" to) the causer(s) of the excess height, it did not make sense to assign or allocate those "excess" heights. That argument is similar to the argument that we accepted above concerning the poles that should be included and not included for the purpose of establishing the investment base for the pole attachment rate. See Section 4(D)(1)(a) and discussion in Part I.A above. Section 5(C) of the Intended Rule therefore proposed to use standard heights of 30 feet for poles that have only telephone and CATV attachments and 35 feet for all other combinations. With the exception of the comment discussed below in sub-Part B, no second round comments were received on this issue and we adopt the Intended Rule provision.

2. Evidence of Different Pole Heights

Section 5(C)(4) of the Rule allows a party the opportunity to prove the different actual amounts of attached space on standard poles instead of the standard assigned spaces that subsection C otherwise requires. By contrast, a party is not permitted to prove that pole height is different from the standard heights stated in subsection B of Section 5 for various attacher combinations (35 feet for most combinations and 30 feet for a pole with only telephone and CATV attachments). NECTA argues that it should be allowed to show the use of different length "standard" poles. "Standard" poles are by definition limited to 30 and 35 feet. NECTA, therefore, hopes to show that some poles that the rule assumes are 35 feet, e.g., those used for electric and CATV attachments only, in fact are only 30 feet. It is possible that a 30-foot pole could be used for electric and CATV only in the relatively rare circumstance that 14.5 feet is the required clearance.

Such proof will not affect the mix of 30 and 35 foot poles used under Section 4(B) to calculate the cost per pole. Rather, it could only affect the overall allocation, perhaps by reducing the amount of common space on a small portion of poles.

However, the difference in overall allocations from a 35 to a 30-foot pole (holding the attached space assignments constant), would be less than 1% in the cable companies' favor. Because of the very small number of 30 foot poles, with only electric and CATV attachments, the overall shift in allocation among all CATV-attached poles would be truly negligible.

We see no need to introduce unnecessary complexity to the process for such a small gain in precision.

3. Electric Utility Space; Neutral Zone

The Proposed Rule assigned 4 feet of space to electric utilities, based on the minimum requirement of space between hot and neutral conductors (44 inches) and the fact that a small amount of space is needed at the top of the pole above the hot conductor(s), particularly where cross arms are used. TAM argued that some, and NECTA argued that all, of the neutral zone should be assigned to electric utilities, based on electric utilities' use of the space for street lighting attachments and transformers. Pine Tree Telephone argued that the need for the neutral zone is a function of the electric utility's attachments, a position we rejected in the Notice and below. CMP, BHE and NET argued in support of the Proposed Rule that all of the neutral zone should be considered common space for the reasons stated in the Notice of Rulemaking.

The Intended Rule proposed that electric utilities would also be assigned one-half foot in the neutral zone, based on the fact that transformers hang down into the neutral space. No comments were received on this issue in the second round of comments.

We do not depart from the view stated in the Notice of Rulemaking that the primary cause of the need for the neutral zone is the desire of attachers to gain the economic benefits of using a joint-use pole. A neutral zone is required on poles with an electric and communication(s) attachers for safety reasons and all attachers, particularly communications attachers, benefit from the protection afforded by the neutral zone. Nevertheless, we also recognize that even though the neutral zone must exist on any pole with both electric and communications attachers, there also is actual incidental use of that space by the electric utilities. A recent survey conducted by the Telephone Association of Maine (TAM) showed, on average, that on the joint-use 35-foot poles located in the

service territories of three independent telephone companies, CMP used 4.39 feet, including those occasions where portions of transformers or streetlighting brackets were located in the neutral zone. The average space used for CMP's conductors alone was 3.72 feet. A relatively small additional assignment of 6 inches to the electric utilities reflects the additional benefit to the electric utilities.

4. Telephone Space

The telephone utilities argued that it was unfair to assign them different amounts of space depending on whether there was a CATV attachment. They argued that they generally did not use any more space when there was no cable television attachment than when there was.

The telephone companies separately argued that assigning them all of the potential communication space (3 2/3 feet or 2 2/3 feet depending on whether there was a cable television attachment or not) was unfair because it was far more space than they actually used. Although the telephone companies admitted that on occasion they have three cable attachments, more often they have one or two attachments. With increasing use of fiber optic cable, the trend may be toward only one attachment; at the same time, attachments on poles of various electronic devices to the telephone and CATV circuitry or optical paths, appears to be increasing. Both NET and TAM state that an assignment of two feet of space would be acceptable. The recent TAM survey discussed above showed an average use by the three independent telephone companies of 1 1/2 feet. No attached space data is available from NET. Whatever amount is actually used, two feet is generally available for the telephone utility.

Based on the considerations set forth above, the Intended Rule (§ 5(C)) proposed to assign two feet to telephone utilities. In its first comment, CMP supported the telephone companies' arguments "as long as the telephone companies are responsible for any costs which result if they use more than the assigned space." Under Section 5(C)(4) of the rule, any party may prove that a different average amount of space should be assigned in a proceeding under 35-A M.R.S.A. § 711. Moreover, the "excess height" provision of Section 7(C) requires the assignment of costs to the attacher causing the need for taller than standard poles. No second round comments were received on this issue and we adopt the Intended Rule proposal.

In its first comment, CMP stated that municipalities typically do not pay for space that they use on poles and that this space should be considered common space, so that the burden (the lost opportunity cost) is shared by all users. CMP views this nonpayment by the municipalities as part of a bargain under which pole owners and users do not pay for use of public rights of way. Much of

the use of space by municipalities is for communications and is adjacent to other communications space. As pointed out by CMP, the reduction of assigned telephone space, from 3 2/3 or 2 2/3 feet in the Proposed Rule to two feet in the final Rule effectively transfers some space from one of the two communications attachers to common space. There is no need for the Rule to say anything about the responsibility for municipal uses; space used by municipalities is automatically part of the common space.

There remains the question of how the CATV attachment space (1 foot) shall be assigned when there is no CATV attachment. Two alternatives were proposed by Pine Tree: (1) assign this space as common space or (2) assign it to the telephone company, which would then collect the entire rate from cable television companies. TAM supported only the first of these alternatives. We proposed to adopt the first alternative in the Intended Rule. As common space, its cost will be borne by both the electric utility and the telephone utility until such time as a cable television attachment is made. No second round comments were received on this issue and we adopt the Intended Rule proposal.

B. Section 5(D): Allocation of Common Space

Attachers to jointly-used utility poles benefit from the cost savings conferred by joint use. Reasoning that each attacher individually has an equal need for the pole space used in common (as distinct from the assigned spaces), the Proposed Rule allocated equally among each attacher the costs associated with this common space. The Public Advocate, NET, CMP and BHE all supported this approach in their initial comments. The Public Advocate and Bangor Hydro supported "pole rental rates which fully compensate pole-owning utilities," at least in part on the ground that telephone and electric services are "necessities of life" and that CATV service did not have that status. To the Public Advocate, "fully covering" those costs was a "higher priority than setting pole rental charges in order to support some other social objective, such as enhancing the penetration of cable TV service" Bangor Hydro argued that "[a]s important as CATV has become, it is simply not a necessity on the same order of magnitude," as electric service. BHE argued that the costs of electricity were increasing for a variety of reasons, and any former "subsidy" to CATV "is no longer bearable."

TAM, as well as NECTA, argued for a formula which would allocate the costs of the common space in the same proportions as the assignments for attached space, as under the present agreement between TAM and Central Maine Power Company (the "TAM-CMP formula"). NECTA argued in support of the formula enacted by Congress and contained in a FCC regulation for those situations in which the FCC regulates pole attachment rates (the "FCC formula"). This formula also allocates the cost of common space in proportion to the amount of

attached space for each attacher. Both of these formulas are discussed in greater detail in the Notice of Rulemaking.

In the alternative, TAM, Pine Tree Telephone and others also argued for an allocation proportional to the hypothetical costs that would be incurred if each user were to forego joint-use, and instead construct a sole-use pole. In the Notice of Rulemaking for the Proposed Rule, we considered such a "stand-alone cost" approach, but rejected it as impractical, given the difficulty of determining average costs for hypothetical sole-use poles. TAM also argued that joint costs may be allocated in many different ways, none of which is uniquely superior to the others.

We agree that economic theory does not provide clear and unambiguous guidance for the allocation of joint costs. While theory does suggest that such costs should be allocated so as to mimic the result that would be reached privately through fully-informed negotiations among parties with equal bargaining power, it remains unclear which, if any, of the allocation methods considered here would result from such a hypothetical negotiation.

For the reasons stated in the Notice of Rulemaking, we do continue to reject the use of the TAM-CMP or FCC formulas or any other formula under which common space is allocated in proportion to attached space. No commenter presented any new argument in support of such a method. Pine Tree argued in support of the TAM-CMP method on the grounds that it produced results which were coincidentally the same as a particular stand-alone method which it also supported, but this is not an argument that the TAM-CMP formula is itself logical. Pine Tree also argued that if the common space is allocated equally among the attacher, then the attached space should also be allocated or assigned equally. This is nothing more than a backhand argument that common space and attached space should be allocated/assigned in the same proportions.

The cable companies and TAM both presented analogies which we find inapposite. NECTA's witness Stuart McDaniel argued at the hearing that the owner of an office building would not allocate common spaces such as parking space or bathrooms equally among the tenants in the building, but would instead allocate in the same proportion as the floor space used by the tenant. This example does nothing more than illustrate a point made in the Notice of Rulemaking: it is appropriate to allocate a common cost in proportion to the use of some other assigned cost only when the amount of common space required is variable in proportion to the other usage. In the office building example, floor space provides a fair measure of the number of employees and the amount of parking and bathroom space needed by those employees. The analogy simply does not apply to joint-use utility poles. The amount of common space required and the

cost for that common space is fixed because of safety code requirements and does not vary with the amount of attachable space required by attachers, either individually or collectively.

TAM's comments presented another office building analogy. Here the building is a multi-story building, apparently located downtown, without a parking lot. TAM identifies the land on which the building is located as the "common space," and argues that if there were two tenants in the building, one of which rented one floor and another which rented all of the remaining floors, the owner would not allocate cost of the land equally to each tenant. TAM is no doubt correct that this kind of pricing could not be sustained in the real estate market. Again, however, a tenant's demand for the presumably expensive real estate lying under the building is in fact probably usage sensitive, roughly in proportion to the amount of floor space demanded. The tenant needing only one floor does not need and probably cannot afford to pay for the cost of half of the expensive downtown land that can economically sustain a multi-story building. The smaller tenant likely would have "stand-alone" alternatives in areas where land prices would not be so high. The example presented by TAM is probably an illustration of a situation in which an actual, feasible stand-alone cost would have to serve as a price ceiling to any alternative form of cost allocation.

In the Intended rule, we proposed to use a stand-alone methodology for the allocation of common costs. The record in this proceeding does not establish that any attacher has stand-alone costs that would be less than the costs of a joint-use pole allocated by the method contained in the proposed rule. Nevertheless, the comments and data do suggest that electric utilities require poles that are taller, stronger, and perhaps more closely spaced, when compared to the poles required by either telephone utilities or CATV companies, and that historic and existing telephone uses have greater pole requirements than CATV uses. We are thus persuaded that an equal sharing of the costs associated with common space would be less equitable than an allocation derived from consideration of stand-alone costs.

The use of stand-alone costs is similar to an equal allocation of common space in that both attempt to allocate on the basis of individual need for costs which are essentially fixed. Both approaches reject any variable sharing of common, fixed costs which is directly derived from the amount of attached space.

As discussed below, the portion of common costs allocated to the cable companies is smaller than the portion allocated to telephone utilities. At some time in the future, cable companies may be permitted to provide local and interexchange telephone service. Other forms of telecommunications or television signal carriage competition between existing attachers to joint-use poles may also

occur. In the event of any such competition, it may be necessary to revisit the common cost allocation issue in a future rulemaking in order to determine whether greater parity is necessary.

Hypothetical costs cannot be measured with precision. Having reviewed all of the information on stand-alone costs available to us here, we find that the overall costs of hypothetical sole-use pole systems constructed for electric, telephone, and CATV purposes can reasonably be estimated as having the proportions of 24 to 20 to 15. The allocation percentages shown in the Intended Rule reflect these proportions.

The Commission determined that a sole-use stand-alone pole for an electric utility is likely to be 30 feet high and that sole-use stand-alone poles for telephone utilities and for cable television systems are likely to be 25 feet high. By itself, this produces a ratio of 30:25:25. The Commission further determined that overall stand-alone costs for a cable television system would be about three-quarters of the cost for a telephone utility, based on the considerations described above. Comments suggested that the spacing of poles for cable television companies could in some cases be further apart than that for electric utilities. Telephone cables historically have been heavier than the cable used for CATV, although, with the increasing use of fiber optic cables, this difference may diminish over time. Nevertheless, under current circumstances, a cable television system might be able to use a lighter and less expensive stand-alone pole, possibly of a different material. Among the comments we relied upon in making this determination were those by Kenneth R. Thompson and W.R. Jackson, Jr.

The further reduction in CATV stand-alone costs produced a ratio of 30 to 25 to 18.75. Reduced to whole numbers, the ratio is 24:20:15. (To calculate this reduction, each number in the 30 to 25 to 18.75 ratio was multiplied by 4/5.

In second round comments, TAM supported the formula contained in the Intended Rule, NECTA apparently did not oppose it and NET made no comment. Both BHE and CMP made the point in their second round comments that the restraint on their span lengths is the proximity of buildings in built-up areas and that 300-foot spans are possible and normal in rural areas. Both claim that CATV spans, even with stand-alone poles, would be subject to the same constraint in built-up areas. As discussed above, however, possible span differences are only one factor in determining the cost differential (4:3) between telephone utilities and cable television systems.

CMP states that "in allocating cost responsibility . . . according to a 24 : 20 : 15 ratio . . . the Commission apparently concluded that electric utility

poles are necessarily required to be substantially taller than the hypothetical poles of other users" On the contrary, it was clear in the Order Allowing Further Comment and should be even clearer now that the final ratio was a cost ratio and was not solely based on height. The cost reduction for cable companies to 3/4ths that of the cost for telephone utilities was based on span and material costs, not height. In any event, as to the matter of height, CMP agrees that for stand-alone poles it would need a taller pole (30 feet) than needed by that telcos and CATVs (25 feet). These are, of course, the same heights used by the Commission.

In its second round comments, CMP argued that "excess height on electric utility poles over 35 feet is almost never caused exclusively by electric utilities," i.e., 1) that the need for the excess height is nearly always mutual; and 2) that excess height poles which are not caused by a need for greater attachable space are nearly always caused by terrain. CMP's argument about excess height on actual mutual-use poles does not appear to affect the validity of the ratios developed above for the cost of hypothetical stand-alone poles. Each entity's hypothetical (or real) pole heights are likely to increase approximately proportionally under the same terrain conditions. We will therefore retain the allocation set forth in the Intended Rule.

VI. SECTION 8: JOINT RESPONSIBILITY AGREEMENTS

Section 8 of the Proposed Rule stated that utilities and cable television systems may enter agreements concerning the allocation of joint-use utility pole costs, but that any agreement must assign or allocate costs, "in amounts approximately equal to the allocation determined under Section 4" (now Section 5). Witnesses and commenters argued that we should not disrupt existing agreements which would differ from the rule by more than "approximate equality," as long as those agreements were satisfactory to the participants. There clearly is a point at which an existing (or future) agreement will be unfair to the customers of one or more attachers to a joint-use utility pole. The intent of this rule is to ensure that joint-use pole costs are allocated fairly and in a manner not detrimental to any customers. Nevertheless, we generally agree with the commenters that reasonably fair existing agreements should not be disturbed. Therefore, the Intended Rule modified Section 8 to state a more flexible standard. The provision also states certain criteria that may be taken into account in determining whether that standard has been met or whether an owner or attacher should seek to modify an existing agreement.

In the second round of comments, Bangor Hydro commented its "fear that through rate case imputation of other than actual arrangements, NET will seek to renegotiate" the current contract between it and BHE, under which each utility shares 50 percent of pole costs. BHE's comment gives no indication that it is

aware of the change to Section 8. We do not decide in this rulemaking order that any particular current contract is "generally consistent with this Chapter," which is the standard stated in Section 8. In its first comment, BHE stated that "considerations . . . such as the administrative cost of changing rates and rate stability to other attaching utilities" should be taken into account. The first of these considerations is now expressly stated in the last sentence of Section 8. Owners and attachers should give appropriate weight to both of the factors stated in Section 8.

VII. SECTION 9: APPLICATION OF EACH UTILITY'S RATE

Section 9 requires a form of rate averaging for the pole attachment rates that cable companies must pay for space on poles which are occupied by both an electric utility and a telephone utility. Under this Section, a portion of each utility's total rate is paid to each utility. The purpose of this provision is to produce a total price for various cable television systems that will be the same throughout the two utilities' overlapping service territories, regardless of whether the two utilities own different proportion of poles in one part of their common territories than in another.

The Proposed Rule required weighting each utility's "whole pole" rate by its overall cost responsibility relative to the other utility. Using this weighting would produce an incorrect total recovery, so that cable companies would pay too much or too little. The final rule therefore requires weighting by the overall ownership percentage of each utility in the utilities' entire common service territory. The final rule is consistent with current practice between NET and CMP.

In its second round comments, TAM states that several of the independent telephone companies (ITCs) in CMP territory charge cable companies, and even CMP itself, 40% of CMP's rate, rather than developing a rate based on their own cost of service. TAM is also correct that in the case of a dispute under the Rule, the Rule would require an ITC to develop its own rate. TAM argues that its members should be allowed to continue charging CMP's rate. Its arguments fall into two general categories: 1) benefits and incentives; and 2) administrative convenience.

TAM claims that ITCs presently do and could provide poles more cheaply than CMP. The claim has not been clearly established in the rulemaking record, but it is, of course, possible that it could be proven. In effect, therefore, these ITCs are requesting the Commission to approve overcharging the cable TV companies and CMP, at least if their claim is correct that their poles are cheaper than CMP's. According to the argument, the overcharging creates an "incentive" to the ITCs put in more of their own cheaper poles and thereby benefit their own customers,

because the overcharging will be passed on to those customers under current residual, cost-of-service ratemaking principles.

If the "incentive" argument were correct, the ITCs would presumably own more poles than they do in service territories that overlap with CMP. Presently, they own less than 10 percent of the poles. In fact, there is no real incentive to the ownership interests of the ITCs precisely because the benefit of overcharging is passed on to customers. Thus, the argument really amounts to one that CMP and cable companies should subsidize low ITC basic service rates. Plainly, it is not the purpose of this rulemaking to create or continue subsidization.

It may be correct that it is an administrative burden for an ITC to develop a cost of service for a relatively small number of poles. It is possible that parties may be able to negotiate a reasonable compromise to a developing full cost of service or, in a litigated proceeding, a partial waiver to this requirement may be requested under Section 15 of the rule.

Finally, the ITCs claim that the Intended Rule will make it "almost impossible" for them to achieve "net billing," i.e., the situation in which no money is transferred between CMP and themselves. According to the argument, net billing will be more difficult to achieve if ITCs must use their own, allegedly lower costs because their bills would then be lower. Achieving net billing is not a justification for overcharging electric utility ratepayers or cable television systems, nor do we see any legitimate public interest served simply by not having to transfer money between utilities.

VIII. SECTION 10: PHASE-IN OF RATES FOR CABLE TELEVISION SYSTEMS

In the original proposed rule, we proposed a limit on annual increases of \$8.00 per pole and \$12.00 per CATV customer. The cable companies did not specifically comment on this proposal, but they did claim that the kinds of increases which they perceived might take place under the Proposed Rule would deter future development of cable systems. We believe that other concerns raised in the first comments about this provision were addressed or obviated by the changes contained in the Intended Rule.

The Intended Rule eliminates the first provision as unnecessary, because the ultimate concern is with the impact of this rule on cable television customers. Data supplied by the cable television companies indicated that most cable companies have somewhat in excess of one pole attachment per customer. Only the most urban cable companies have less than one pole per customer. We retain the per-customer annual increase cap but propose to reduce it to \$4.80 per year or \$.40

per month. We do not believe that a maximum monthly increase of \$.40 in each year can be considered disruptive to cable television customers.

In the second round of comments, NET stated that the Rule should require cable television systems to report both the number of customers and the number of pole attachments on an annual basis, so that the phase-in can be implemented. It is unclear why the utility itself would not know the number of attachments. However, it is obviously important for the billing utility to know the number of cable company customers so that the increase in cost-per-customer can be calculated. A provision requiring a cable television system to report the number of customers has been added.

Following our deliberation session at which we decided to include the requirement above, NECTA filed an additional comment staking its concern that the number of customers of a cable company was trade secret information. 35-A M.R.S.A. § 711(3) states that "any actions taken or orders issued by the Commission under this section shall take into account the interests of the subscribers of the affected cable television system" (emphasis added) This provision presumably applies to this rulemaking, which was required by section 711(4).

As stated above, and in the Notice of Rulemaking, the purpose of the phase-in provision is to protect CATV subscribers, and not CATV shareholders. The utility owning joint-use poles cannot know whether an increase will exceed \$4.80 per year per CATV subscribers unless it knows the number of subscribers.

The Commission, of course, does not directly regulate the rates of cable television companies. A cable company facing a \$4.80 increase per customer in a year could (subject to recent federal regulation or, in some areas of Maine, municipal regulation) attempt to increase its rates by much more than \$4.80 a year, or by much less.

Nevertheless, the underlying assumption of our adoption of the phase-in provision is that cable companies may attempt to cover cost increases. For this reason, we are reluctant to give cable companies the option of declining to use the phase-in provision, at least if their customers are at risk of paying increase greater than \$4.80 a year, thus frustrating the purpose of that provision.

However, Section 10 has been further amended to make specific reference to an exemption or waiver that is in any event available under Section 15 of the Rule. In ruling on an exemption request, the Commission will consider the sensitivity of the information and will apply the trade-secret provisions of M.R.Civ.P. 26(C)(7) and M.R.Evid. 507.

In determining potential harm to cable companies, we will consider the extent to which the information will be provided to an entity which may at that time be a potential competitor to the cable company. Finally, we will consider the extent to which a CATV system intends (or, under existing regulation, is able) to pass on more than a \$4.80 a year increase to its subscribers.

IX. SECTION 11: FLOW-THROUGH OF REVENUE CHANGES TO UTILITY CUSTOMERS

No commenter opposed this provision in the Proposed Rule. The Proposed (and final) Rule applies only to increases in revenues to utilities from cable companies. In its initial comments, however, NET suggested that the flow-through provision be expanded to include cost shifts between utilities that might affect shareholders, even if they did not affect ratepayers. Ratepayers have relatively limited ability to initiate or prosecute a rate case, but the utilities themselves and the Commission have ample power to do so, if a rate case becomes necessary because of shifts in pole costs between utilities. As discussed in the Notice of Rulemaking, the purpose of this provision is to provide a limited exception to normal ratemaking practice in order to insure that utility ratepayers will receive the benefit of increase revenues from cable companies in order to offset any possible increases in CATV rates which may result from the application of the Rule.

The Intended Rule did include certain changes which we consider to be improvements compared to the Proposed Rule provision. As suggested by CMP in its first comment, the Intended and final Rule allows a utility to pass through revenue increases immediately or to defer them until its next rate case, provided that the rate case occurs within a reasonable period of time. NET's second round comments, indicating that it believed immediate flow-through to be mandatory, is therefore incorrect. NET also argues against "automatic" flow-through on the ground that it is not clear that CATV systems will always themselves flow through the rate increases to their customers. NET argues that "it is possible that a cable system may be able to pay higher attachment fees out of current operating margins." NET does not mention recently introduced FCC regulation of CATV rates, which may, or may not, allow pole attachment rate increase to be passed on. We have made the assumption that a seller generally will at least attempt to pass on all costs, subject to market conditions and regulation. We believe that assumption is generally valid and do not believe we should engage in determining whether cost increases have been passed through in every case.

The Intended Rule also eliminated the proposed amount of revenue increase that must occur (0.25%) prior to the flow-through requirement applying. In its first comment, CMP supported this limitation, but also supported the deferral method described above. We believe that the deferral option mitigates any concern about

rate changes for amounts that are relatively small. The revision requires all deferred revenues to be retained in a suspense account so that eventually all increased revenues will benefit utility ratepayers.

Finally, on the ground that the primary burden of any increases in CATV rates which may result from this rule will be to residential customers, the flow-through of revenue increases to utilities, at least outside of rate cases, shall be to utility residential customers. In its second round comments, NET argued that flowing through revenues only to the basic rates for residential customers (which applies only outside of general rate cases) "does not always represent the paramount ratemaking objective." Of course, NET's rate design is now under consideration by the Commission in Docket No. 92-130, and no particular ratemaking objectives have been established in that proceeding. We are satisfied that the reason stated in the Order Allowing Further Comment and above is a valid reason for the limited rate design policy established in this provision.

TAM, in its second comment, points out that revenue increases to utilities will occur for two reasons: 1) increases in rates resulting from the revenue requirement and allocation formulas of the Rule itself; 2) year-to-year increases in the utility's pole costs. TAM argues that the only increase which should be flowed through to customers should be those resulting from the Rule, not those resulting from increased costs. We agree, and this section has been modified accordingly. TAM also argues, however, that the effect from the Rule will occur "primarily in the first year." Because of the phase-in provision, effects from the Rule may not occur for all CATV systems in the first year. The final rule requires flowing-through revenue increases resulting from the rule (or agreements entered under the rule) in any year. In the first year, no attempt will be made to separate out that portion of the rate which is attributable to "cost increases," because the old (pre-rule) rate almost certainly will have been based on a different group of costs, and the costs themselves are likely to be out-of-date.

X. SECTION 13: RETROACTIVITY

A. § 13(A): Applicability of Rule

As discussed above, a portion of Section 2 in the Intended Rule stated that the rule will not govern recovery for periods prior to the effective date of the rule. That provision has been transferred to § 13(A). It applies both to pending

cases and to cases filed after the effective date of the Rule.² In this rulemaking, we do not decide what policies will apply to periods prior to the effective date of the rule. In cases in which claims are made that the Commission should order recovery for periods prior to the effective date of the Rule, parties are free to argue what policies, including those which may be stated in the Rule, should apply, if any recovery is ordered for that period. See discussion of § 13(B) below.

B. § 13(B): Applicability of Orders

Section 11 of the Proposed Rule (Section 13 in the Intended Rule and now Section 13(B) and (C)) would have made Commission orders in proceedings under 35-A M.R.S.A. § 711 retroactive to the "date that joint users fail to agree upon compensation." In the Intended Rule, we stated that orders shall apply only following the date that a complaint is filed, in part to avoid the need to determine the factual question of when a dispute arose.

In response to the Intended Rule, TAM commented that rather than stating a cut-off date for any retroactive recovery (e.g., the date the complaint is filed), the Rule should be "silent;" i.e., it should leave to case-by-case adjudication whether, and how far back, compensation should be ordered for prior periods. TAM argues that presently CATV companies are refusing to pay recently increased rates that ITCs have been billing and that some ITCs were waiting to see the result in the pending CATV-CMP complaint case. We agree with TAM's position, as well as the similar position expressed by CMP in its letter of September 13, 1993, following the first deliberation on the Intended Rule on September 9, 1993.

For cases filed after the effective date of the Rule, Section 13(C) states that recovery for periods prior to the filing of the complaint will be ordered, or not, in the Commission's discretion. Unlike the Intended Rule, no particular cut-off date is stated. As in the Intended Rule, recovery for periods following the filing of the complaint will be mandatory.

²In the Intended Rule, this statement of nonapplicability was stated to apply only to "pending cases" at the time the rule became effective. At that time, it was not necessary for the statement to apply other than to pending cases because Section 13 of the Intended Rule (now § 13(C)) stated that no recovery would be ordered in future cases for any date prior to the filing of the complaint in those cases. As discussed below, such recovery is now possible in the Commission's discretion. Therefore, the § 13(A) statement of rule nonapplicability is broadened to apply to all cases.

Section 13(B) states a slightly different rule for the one case (between various cable companies and Central Maine Power Company, Docket No. 93-030) that we expect will be pending at the time the Rule becomes effective. In that case, the Commission will exercise discretion for periods prior to the effective date of the Rule. Recovery for periods after the effective date of the Rule (if any is ordered) will be mandatory. This provision is identical to the statement which was made in Order Allowing Further Comment at page 9 and to the assumption stated by CMP in its letter of September 13, 1993 addressing retroactivity issues.

XI. SECTION 14(A): REQUIREMENT FOR NEGOTIATION

Present Chapter 88 contains a requirement that the parties undertake serious negotiations prior to the filing of a complaint under 35-A M.R.S.A. § 711. The Proposed Rule carried this policy forward in Section 14(A). As discussed above in connection with Section 13(C), we decided at the time of the Intended Rule, and have affirmed here, that orders under section 711 will be retroactive to the date a complaint is filed, but that retroactivity before that date will be discretionary. This policy may create an incentive for parties to file a complaint. A pre-complaint negotiation requirement conflicts with the Section 13(C) policy and is inappropriate. Resources should not be used to determine whether one or another party negotiated in good faith, assuming such an issue were even relevant. We therefore have eliminated the negotiation requirement. Negotiation can clearly take place at any time and is encouraged.

XII. WAIVER

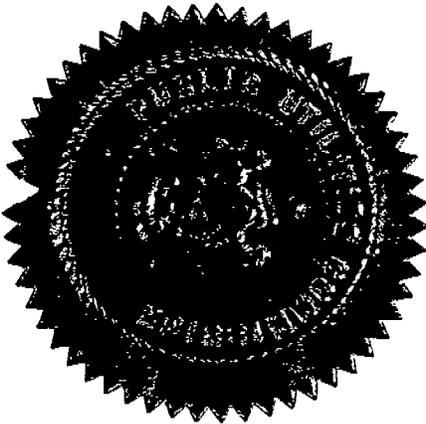
This provision is similar to other provisions in the Commission's rules which allow deviation, exemption or waiver from a rule. The exception stated in the second sentence is necessary because the 360-day time limit stated in Section 14(C), for disputes between cable companies and utilities, is mandated by the federal statute deferring to state regulation of pole attachment rates for cable companies, 47 U.S.C. § 224(c)(3)(B)(ii).

XIII. THE CREATION OF "ENTITLEMENTS" FOR CABLE COMPANIES

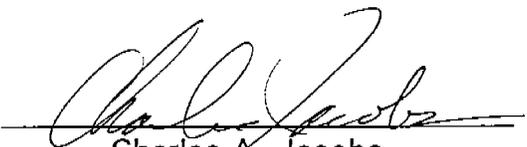
TAM has expressed a concern that the Rule creates "entitlements" for cable companies to place attachments on utility-owned poles. They do not cite any particular provisions of the rule that supposedly have this effect, and they do not propose any specific solution to this perceived problem beyond some proposed language changes to Sections 7(A) and (C). It is not clear how either of the two proposed changes makes any substantive difference, although one has been adopted for the purpose of greater clarity. The second proposed change is inconsistent with other provisions concerning excess height.

Virtually the entire purpose of this rule is to establish guidelines for pole attachment rates and charges if a dispute should be brought to the Commission under 35-A M.R.S.A. § 711.³ It is not the intent of this rule to change the legal relationship between non-owner attachers and the owners of joint-use utility poles. Any attempt to do so might be in conflict with the legal relationship generally defined in the statute.

Dated at Augusta, Maine, this 18th day of October, 1993.



BY ORDER OF THE COMMISSION


Charles A. Jacobs
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Paine
 Nugent

This document has been designated for publication.

³Two provisions in the Rule do refer to issues other than rates. Section 14 refers to complaint proceedings in which the issue may be "whether joint use shall be permitted." This section is purely procedural and simply follows the wording of statute. Section 12 provides an informal procedure to address various disputes about attaching, but only those which arise under a Commission order entered pursuant to 35-A M.R.S.A. § 711.