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Comments: Equal Access to Pole Attachment Agreements: Implications of Telephone Company Participation in the Cable Television Market

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EQUAL ACCESS TO POLE ATTACHMENT AGREEMENTS: IMPLICATIONS OF TELEPHONE COMPANY PARTICIPATION IN THE CABLE TELEVISION MARKET

I. INTRODUCTION

Since the advent of cable television ("CATV") in the 1950's, the CATV industry has spiraled in growth. The expansive development of this communication medium, however, did not occur without the intervention of government regulation. One area identified by the Federal Communications Commission ("FCC") that required governmental oversight was access to utility poles and underground conduits for the attachment of cable distribution equipment.[1]

Historically, the CATV industry has utilized leasing arrangements to secure access for cable distribution systems rather than constructing its own poles or conduits.[2] In the majority of cases, CATV companies use leasing arrangements known as pole attachment agreements to acquire access to utility poles.[3] These arrangements involve a rental of a portion of communication space[4] on existing utility poles for the attach-

1. CATV systems consist of three components: (1) a receiving station which picks up signals transmitted by television and radio; (2) "headend" equipment which converts the signals so that they can be retransmitted along coaxial cable; and (3) a coaxial cable distribution system which carries programming from the headend equipment to the homes of the subscribers. General Tel. Co. v. F.C.C., 413 F.2d 390, 393 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). The cable distribution system, the third component, consists of three parts: (1) a trunk cable which runs from the headend equipment to the utility poles; (2) distribution cables which carry the signal from pole to pole; and (3) "drop lines" running from the utility poles to the subscribers' homes. *Id.* Although these cables are usually attached to utility poles, they may also be run underground. *See* Continental Cablevision v. American Elec. Power Co., 715 F.2d 1115, 1116 (6th Cir. 1983); Seigel, *The History of Cable Television Pole Attachment Regulation*, 4 COMM. LAW. 9, 9 (1984).
2. *See infra* notes 15-19 and accompanying text.
3. The term "pole attachment" refers to any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a power utility or a telephone company. 47 U.S.C. § 224 (a)(4) (1982). The phrase "owners of utility poles" refers to poles owned or under the control of both power companies and telephone companies. It does not include any railroad, any cooperative organization or any person owned by any state or federal government. *Id.* § 224(a)(1).
4. Generally, utility poles have between 11 and 16 feet of "usable space" for power and communication equipment. *See In re* Adoption of Rules for the Regulation of Cable Television Pole Attachments, 77 F.C.C.2d 187, 191-93 (1980); S. REP. NO. 580, 95th Cong., 2d Sess. 1, 20, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 109, 128. "Usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment. 47 U.S.C. § 224(d)(2) (1982). The usable space is rebuttably presumed to be 13.5 feet. *See In re* Adoption of the Rules for the Regulation of Cable Television Pole Attachments, 72 F.C.C.2d 59, 69 (1979). Five feet of pole space is typically required for power equipment with the remaining space being divided between communication services. Although the actual cable used for the distribution of CATV programming occupies only one inch of this space, CATV systems are deemed to occupy one foot of usable space. Monongahela Power Co. v. F.C.C., 655 F.2d 1254, 1256 (D.C. Cir. 1981) (one foot of space attributable to CATV is reasonable), *aff'g In re* Adop-

ment of cable distribution equipment owned by CATV operators. In other cases, leasing arrangements known as channel service offerings have been employed to distribute cable programming. Under channel service arrangements, telephone companies own the equipment necessary for cable distribution and furnish channel services to CATV operators.[5] CATV operators use this distribution service for a fee in lieu of pole attachment agreements.

Because of anticompetitive behavior by the owners of utility poles, CATV operators were often unable to secure either pole attachments or channel service offerings, or were unable to prevent owners from imposing unreasonably high rents for pole attachments.[6] To prevent anticompetitive behavior and encourage nation-wide distribution of CATV, Congress enacted, and the FCC promulgated, restrictions designed to eliminate predatory practices involving CATV access to utility poles and conduits. One restriction promulgated by the FCC, known as the cross-ownership rules, prohibits telephone companies from owning, either directly or through affiliates, cable television systems within their telephone service areas.[7] A second restriction, the Communications Act Amendments of 1978,[8] ("Pole Attachment Act") empowers the FCC with the authority to ensure that the rates, terms and conditions of pole attachment agreements are "just and reasonable."[9]

The success these restrictions have had on the CATV industry is evidenced by CATV's evolution into a mature industry.[10] This market maturity, and consequent economic stability of the CATV industry, how-

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tion of Rules for the Regulation of Cable Television Pole Attachments, 77 F.C.C.2d 187, 188-91 (1980); S. REP. NO. 580, *supra*, at 20, 1978 U.S. CODE CONG. & ADMIN. NEWS at 128. *See generally* Seigel, *supra* note 1, at 10.

5. *See In re* General Tel. Co., 13 F.C.C.2d 448, 449 (1968), *aff'd sub nom.* General Tel. Co. v. F.C.C., 413 F.2d 390, 393 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).
6. *See infra* notes 20-24, 115-127 and accompanying text.
7. *See* The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2785 (codified at 47 U.S.C. § 533(b) (Supp. IV 1986)); 47 C.F.R. §§ 63.54-63.58 (1988); *see also In re* General Tel. Co., 13 F.C.C. 2d 448 (1968), *aff'd sub nom.* General Tel. Co. v. F.C.C., 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969); 47 U.S.C. § 214 (1982). *See generally In re* Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307, *reconsidered in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); *In re* Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 34 Fed. Reg. 6,290 (1969) (notice of proposed rule making).
8. Communications Act Amendments of 1978, Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (codified at 47 U.S.C. § 224 (1982 & Supp. IV 1986)) [hereinafter Pole Attachment Act].
9. 47 U.S.C. § 224(b)(1) (1982).
10. The FCC has estimated that approximately 80 percent of the nation's homes are now able to receive cable television. This figure is up almost 65 percent from the mid 1970's. Approximately 51 percent of the nation's television households actually subscribe to cable television service. *See In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 F.C.C.Rcd. 5849, 5851-52,

ever, recently led the FCC to reconsider the continued viability of the cross-ownership rules.[11] As a result of this inquiry, the FCC has tentatively concluded that a relaxation of the restrictions on telephone-cable company affiliation "would result in greater, not lesser, competition in cable television service and, therefore, in greater public interest benefits to consumers."[12]

This comment reviews the combination of factors that prompted the need for the Pole Attachment Act and examines the jurisdictional development of pole attachment regulation. Next, the history of the cross-ownership rules is explored. This section also examines the developments that have occurred since the rules' enactment and analyzes the impact that relaxing the cross-ownership rules would have on access to pole attachments under the current statutory framework. Finally, new rules are advocated that would ensure equal access to pole space for independent CATV systems.

II. POLE ATTACHMENT REGULATION

A. The Need for Government Regulation

A significant number of pole attachment agreements had been negotiated prior to enactment of the Pole Attachment Act.[13] Eventually, however, internal conflicts and external forces prompted the need for government intervention. For example, a gross inequality in bargaining power between the CATV industry and the utility industry resulted in disputes over the rates, terms and conditions of pole attachments.[14] Similarly, a jurisdictional impasse between the FCC and the states left CATV companies without a forum for the review and resolution of pole attachment rate disputes.

Two factors initially contributed to the inequity of bargaining position between CATV companies and utility companies. First, the CATV industry depends on pole attachments as a means of cable broadcasting

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5853 (1988); H.R. REP. NO. 934, 98th Cong., 2d Sess. 21 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4658.

11. *See In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 2 F.C.C.Rcd. 5092 (1987) (notice of inquiry).
12. *In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 F.C.C.Rcd. 5849, 5849 (1988) (further notice of inquiry and notice of proposed rule making).
13. The FCC has estimated that over 7,800 CATV pole attachment agreements had been entered into prior to the enactment of the Pole Attachments Act. S. REP. NO. 580, *supra* note 4, at 12, 1978 U.S. CODE CONG. & ADMIN. NEWS at 120.
14. As of July 1977, pole attachment disputes existed in 27 states. These disputes arose as the result of the escalating cost of pole attachment agreements. During the period immediately preceding July 1977, pole attachment rates increased 55 percent with the average cost of a pole attachment rising from $3.90 to $6.05 per pole. *See* H.R. REP. NO. 751, 95th Cong., 1st Sess. 1, 5 (1977). Service to many CATV subscribers was interrupted as a result of these disputes. *See* H.R. REP. NO. 751, *supra*, at 3; 123 CONG. REC. 35,008 (daily ed. Oct. 25, 1977) (remarks of Cong. Broyhill).

distribution.[15] CATV industry reliance on these lease arrangements, as opposed to installation of its own poles, was not entirely voluntary. Rather, the CATV industry was virtually forced to use these arrangements because of "practical, economic, and aesthetic reasons."[16] Practically, installation of CATV poles would have been a wasteful duplication of resources because space on existing utility poles was not being fully utilized.[17] Economically, the cost of leasing the space needed by CATV systems was much less than the cost of erecting separate utility poles.[18] Finally, a duplication of utility poles and wires would create a "haphazard mesh on the skyline."[19]

The second factor leading to the disparate bargaining positions of the parties involved the telephone and power companies' domination of ownership and control of the poles necessary for attachment.[20] Although pole attachment agreements provided income to the utility from an otherwise surplus portion of plant, the utility companies recognized that this source of income was not as vital to them as the pole attachment agreements were to the CATV companies.[21] In addition, telephone companies were often reluctant, occasionally to the point of employing anticompetitive practices,[22] to negotiate competitive pole

15. *See* 123 CONG. REC. 35,008 (daily ed. Oct. 25, 1977) (remarks of Cong. Broyhill). Prior to the enactment of the Pole Attachment Act, cable television companies owned or controlled less than one percent of the over 10 million poles to which CATV lines were attached. S. REP. NO. 580, *supra* note 4, at 13, 1978 U.S. CODE CONG. & ADMIN. NEWS at 121. Power companies owned or controlled 53 percent of the utility poles involved in attachment agreements. Telephone companies controlled the majority of the remaining poles. *See id.*
16. Chesapeake & Potomac Tel. Co. v. Maryland/Delaware Cable Tel. Ass'n, 310 Md. 553, 556, 530 A.2d 734, 736 (1987).
17. *See supra* note 4.
18. *See, e.g.*, Cable Information Serv., Inc. v. Appalachian Power Co., 81 F.C.C.2d 383, 387-89 (1980) (net cost of a bare pole was found to be approximately $114, whereas the maximum rental fee was found to be under $2); Teleprompter of Fairmont v. Chesapeake & Potomac Tel. Co., 79 F.C.C.2d 232, 236-37 (1980) (net cost of a bare pole was found to be $90.30, whereas the maximum rental fee was found to be under $2).
19. *Chesapeake & Potomac Tel. Co.*, 310 Md. at 560, 530 A.2d at 738; *see also* H.R. REP. NO. 751, *supra* note 14, at 2; 123 CONG. REC. 35,008 (daily Ed. Oct. 25, 1977) (remarks of Cong. Broyhill).
20. *See supra* note 15.
21. S. REP. NO. 580, *supra* note 4, at 16, 1978 U.S. CODE CONG. & ADMIN. NEWS at 124.
22. *See, e.g.*, TV Signal Co. v. AT & T, 462 F.2d 1256, 1259 (8th Cir. 1972) (telephone company refused to grant franchised CATV operator a pole attachment agreement but offered a restricted lease-back service); *In re* Dimension Cable TV, Inc., 25 F.C.C.2d 520 (1970) (telephone company impermissibly constructed CATV channel facilities under the guise of a separate corporation without obtaining requisite 214 certification); *In re* TeleCable Corp., 19 F.C.C.2d 574 (1969) (telephone company refused to negotiate pole attachments and increased the rental of existing agreements from $3.00 to $4.50 in order to promote its channel distribution service); *In re* General Tel. Co., 13 F.C.C.2d 448, 462-63 (1969) (by reason of their control over utility poles, telephone companies were in a position to preclude or delay an unaffiliated CATV system from commencing service), *aff'd sub nom.* General Tel. Co. v.

attachment leases because of a desire to develop and utilize their own cable access distribution systems.[23] Accordingly, the utility companies were "unquestionably in a position to extract monopoly rents from the CATV systems in the form of unreasonably high pole attachment rents."[24]

The combination of utility monopoly power and CATV dependence inevitably resulted in disputes between the parties over the availability and conditions of pole attachment agreements.[25] Unable to resolve these disputes amoung themselves, the parties, particularly the CATV industry, sought resolution of the disputes in the courts.

At the federal level, the parties looked to the Federal Communications Commission for the resolution of pole attachment disputes. Beginning in 1966 with *In re California Water & Telephone Co.*,[26] the FCC began a ten year examination of the extent and nature of its jurisdiction over pole attachment agreements. Initially, the FCC asserted jurisdiction over pole attachment agreements which involved only telephone companies.[27] Basing its decision on a broad interpretation of the Communications Act of 1934,[28] and on judicial interpretation of the Act,[29] the FCC reasoned that telephone company pole attachments were inci-

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F.C.C., 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969); *see also infra* notes 115-127 and accompanying text.

23. Although telephone companies are prohibited, directly or through their affiliates, from furnishing CATV service in their telephone service area, they are permitted to provide channel service offerings to unaffiliated CATV operators. In a channel service offering, the telephone company owns the distribution equipment and leases channels of communication to the CATV operator for a fee in lieu of pole attachment agreements. However, before the telephone companies provide such a distribution service, they must offer to make pole attachment access available to the CATV operator. *See In re* Application of Telephone Companies for Section 214 certificates for channel facilities furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307 (1970), *aff'd sub nom.*, General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971); 47 C.F.R. § 63.57 (1988); *see also infra* note 130 and accompanying text. *See generally* Paragon Cable Tel., Inc. v. F.C.C., 822 F.2d 152, 155 (D.C. Cir. 1987).
24. S. REP. NO. 580, *supra* note 4, at 13, 1978 U.S. CODE CONG. & ADMIN. NEWS at 121.
25. *See, e.g., In re* Continental Cablevision of N.H., Inc., 45 F.C.C.2d 1058 (1974) (dispute over "first-come, first-serve" policy regarding make-ready costs for pole attachments); *In re* Better TV of Dutchess County, N.Y., Inc., 31 F.C.C.2d 939, 944 (1971) (allegation that telephone company discriminated in denying CATV operator access to duct space).
26. 5 F.C.C.2d 229 (1966). The pole attachment investigation arose out of the same proceedings which led to the development of the cross-ownership rules. *See infra* notes 102, 104 and accompanying text.
27. *In re* California Water & Tel. Co., 21 F.C.C.2d 307 (1970).
28. The statutory basis upon which the FCC relied was section 152(a) of title 47 of the United States Code which confers jurisdiction to the FCC over "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a) (1982 & Supp. IV 1986); *see also id.* §§ 151, 153(a)-(b) (1982).
29. The judicial basis rested on the Supreme Court's interpretation of FCC authority to regulate cable television in United States v. Southwestern Cable Co., 392 U.S. 157, 167-68 (1968) (FCC has broad authority to regulate "all forms of electrical commu-

dental to transmission by wire or radio, and were therefore within its jurisdiction.[30]

In 1977, however, the FCC reversed its initial decision, finding that it had no jurisdiction under the Communications Act of 1934 to regulate pole attachment agreements between CATV companies and telephone companies.[31] This change in jurisdictional policy evolved for two reasons. First, the Commission reasoned that although it possessed broad powers to regulate all forms of communication, the fact that pole attachment agreements were necessary to the CATV industry was not sufficient to bring the agreements within the FCC's authority.[32] Second, the Commission concluded that since there was a division of ownership and control of the poles between power and telephone companies,[33] it would be irrational and ineffective to assert jurisdiction over telephone pole attachments while not asserting jurisdiction over power company pole attachments.[34] Accordingly, disputes over pole attachment rates and conditions could not be resolved on a federal level.

While the FCC was in the process of determining that it lacked the necessary authority to regulate pole attachment agreements, jurisdictional issues were also being addressed at the state level. The state courts, however, proved to be an inadequate forum for the resolution of pole attachment disputes. Although employing a slightly different analysis than the FCC,[35] a number of state courts also refused jurisdiction over such disputes.[36] Generally, these states concluded that pole attachment agreements were neither a public utility service,[37] nor sufficiently

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nications, whether by telephone, telegraph, cable, or radio.") (quoting S. REP. NO. 781, 73d Cong., 2d Sess. 1 (1934)).

30. *California Water*, 21 F.C.C.2d at 327. For a more detailed analysis of this decision, see Seigel, *supra* note 1, at 10-13.

31. *In re* California Water & Tel. Co., 40 Rad. Reg.2d (P & F) 419 (1977).

32. *Id.* at 425-26.

33. *See supra* note 15.

34. *California Water*, 40 Rad. Reg.2d at 426-27.

35. *Compare In re* California Water & Tel. Co., 40 Rad. Reg.2d (P & F) 419 (1977) (denial of jurisdiction because pole attachments did not constitute wire or radio communications) *with* Ceracche Tel. Corp., v. Public Serv. Comm'n, 49 Misc.2d 554, 267 N.Y.S.2d 969 (N.Y. Sup. Ct. 1960) (denial of jurisdiction because pole attachments did not constitute a public service).

36. *See, e.g., In re* Southern Bell Tel. & Tel. Co., 65 Pub. Util. Rep.3d (PUR) 117, 120 (Fla. Pub. Serv. Comm'n 1966) (in absence of legislation specifically granting jurisdiction, public service commission had no jurisdiction over pole attachments); Consolidated Cable Serv., Inc. v. Leary, 382 S.W.2d 78 (Ky. 1964) (court lacked power to compel public corporation to allow anyone to use its poles); Ceracche Tel. Corp. v. Public Serv. Comm'n, 49 Misc.2d 554, 267 N.Y.S.2d 969 (N.Y. Sup. Ct. 1960) (regulation of CATV is a question for the legislature, not the courts); WCOG, Inc., v. Southern Bell Tel. & Tel. Co., 64 Pub. Util. Rep.3d (PUR) 314, 318 (N.C. Util. Comm'n 1966) (because a pole attachment is a private use of surplus facilities, it is beyond the commission's authority).

37. *See* International Cable TV Corp. v. All Metal Fabricators, Inc., 66 Pub. Util. Rep.3d (PUR) 446, 463 (Cal. Pub. Util. Comm'n 1966) (in the absence of a public offering, pole attachments do not constitute a public utility service).

related to public utility services,[38] to come within the ambit of the state regulatory commissions' authority.[39]

Thus, the CATV industry was faced with a two-fold problem. First, it lacked the bargaining power necessary to prevent unreasonable and arbitrary pole attachment practices by utility pole owners. Second, it lacked an available forum where these practices could come under review. The solution to the CATV industry's problems rested on legislative intervention. The result was the adoption of the Pole Attachment Act of 1978.[40]

B. The Dual Regulatory Policy of the Pole Attachment Act

With the enactment of the Pole Attachment Act, Congress introduced a comprehensive plan of regulation designed to redress the problems associated with pole attachment agreements. One of the central purposes of this legislation was the establishment of a mechanism to assure the availability of a forum for the review and resolution of pole attachment disputes.[41] The mechanism which resulted produced a dual system of federal and state regulation over pole attachment agreements.

1. Federal Regulation

Section 224(b) of the Pole Attachment Act empowers the FCC with the regulatory authority to hear disputes arising over the rates, terms and conditions of pole attachment agreements.[42] Although not amounting to a classification of pole attachments as "wire or radio communications," the Pole Attachment Act expands the FCC's authority to include entities[43] and practices[44] not otherwise subject to FCC regulation.[45] This expansion of jurisdictional authority enables the FCC to hear pole attachment disputes regardless of who owns or controls the poles subject to attachment.[46]

The Pole Attachment Act also empowers the FCC with the authority to ensure that the rates, terms and conditions of pole attachment agreements are "just and reasonable."[47] Specifically, Congress mandated

38. *See Ceracche Tel.*, 49 Misc.2d at 557, 267 N.Y.S.2d at 972-73 (rental of pole space by company to a CATV operator is not part of the public service performed by a company in the business of telephonic communications).
39. For a more detailed analysis of each of the states rulings, see Seigel, *supra* note 1, at 13-16.
40. Communications Act Amendments of 1978, Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (codified at 47 U.S.C. § 224 (1982 & Supp. IV 1986)).
41. S. REP. NO. 580, *supra* note 4, at 14, 1978 U.S. CODE CONG. & ADMIN. NEWS at 122.
42. 47 U.S.C. § 224(b)(1) (1982).
43. Principally, power utilities. *See* S. REP. NO. 580, *supra* note 4, at 15, 1978 U.S. CODE CONG. & ADMIN. NEWS at 123.
44. Principally, intrastate practices of power utilities. *See id.*
45. *Id.*
46. *Id.*
47. 47 U.S.C. § 224(b)(1) (1982).

a range of just and reasonable rates that:

> [A]ssures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . . .[48]

Pursuant to this authority, the FCC established the following formula to determine the maximum[49] just and reasonable rate for pole attachments:

> Maximum Rate = [Space Occupied by CATV/Total Usable Space] × [Operating Expenses + Capital Cost of Poles][50]

In practice, however, the FCC employs a slightly different formula. Instead of expressing operating expenses and capital costs of poles directly as dollar amounts, the FCC expresses these costs as a percentage of net pole investment.[51] Thus, the operating expenses and capital costs of poles are normally determined from the net cost of a bare pole multiplied by the carrying charges attributable to the cost of owning a pole. The product of this calculation is then multiplied by the percentage of space used by the cable operator. The formula actually used by the FCC in computing the maximum rate for pole attachments is as follows:

> Maximum Rate = [Space Occupied by CATV/Total Usable Space] × [Net Cost of a Bare Pole] × [Carrying Charges].[52]

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48. *Id.* § 224(d)(1) (1982 & Supp. IV 1986); *see also* 124 CONG. REC. 1598 (daily ed. Jan. 31, 1978) (remarks of Sen. Hollings); 123 CONG. REC. 35,007-08 (daily ed. Oct. 25, 1977) (remarks of Cong. Wirth). This formula produces a zone of reasonableness between incremental costs incurred by the utility as a result of the cable attachments and fully allocated costs incurred by the utility in owning the poles regardless of the presence of cable. *See* S. REP. NO. 580, *supra* note 4, at 19, 1978 U.S. CODE CONG. & ADMIN. NEWS at 127. The FCC, however, is not permitted to chose any figure which falls within the zone of reasonableness and set its rate there. Rather, the FCC must reach a "rational decision through rational means." *See* Texas Power & Light Co. v. F.C.C., 784 F.2d 1265, 1269 (5th Cir. 1986); Alabama Power Co. v. F.C.C., 773 F.2d 362, 366-67 (D.C. Cir. 1985).

49. Virtually all of the complaints involving rate disputes are filed by the cable companies and allege that a utility is charging a rate in excess of the maximum level. As a result, the Commission focuses on the maximum rate allowable under the Pole Attachment Act. The pole attachment rate determined by the FCC formula, therefore, is rebuttably presumed to fall above the minimum statutory rate. *See In re* Amendment of Rules and Policies Governing the Attachment of Cable Hardware to Utility Poles, 2 F.C.C.Rcd. 4387, 4394 (1987); 47 C.F.R. § 1.1409(b) (1988).

50. *See In re* Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 F.C.C.2d 59, 70 (1979) (second report and order); *In re* Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, 1605 (1978) (first report and order); *see also* 47 C.F.R. § 1.1409(c) (1988).

51. *See* 47 C.F.R. § 1.1404(g)(9) (1988).

52. *See* Alabama Power Co. v. F.C.C., 773 F.2d 363, 364-65 (D.C. Cir. 1985); *In re* Cable Information Serv., Inc., 81 F.C.C.2d 383, 386 (1980). For purposes of this formula, space occupied by the CATV system is rebuttably presumed to be one foot and total usable space is rebuttably presumed to be 13.5 feet. *See supra* note 4. The

This FCC rate determination formula has recently come under judicial scrutiny in *Alabama Power Co. v. F.C.C.*[53] In *Alabama Power*, the United States Court of Appeals for the District of Columbia determined that the FCC rate formula methodology did not result in the calculation of the maximum just and reasonable rate allowable under the Pole Attachment Act.[54] In addition to finding that the FCC made several mathematical and conceptual errors, the court held that the Commission had improperly excluded the expenses incurred by the utility in providing guy wires and anchors in determining the figure for the net cost of poles,[55] and that the Commission's decision to deny the use of the normalized tax method in calculating the carrying charges was arbitrary and capricious.[56] In response to this decision, the FCC modified its practices and formulas for computing maximum allowable rates for pole attachment agreements.[57]

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percentage used for computing carrying charges is determined from the sum of the percentage of pole investment devoted to each of five categories of expenses: administration, maintenance, taxes, depreciation, and cost of capital. *See Alabama Power*, 773 F.2d at 369; *Cable Information Serv.*, 81 F.C.C.2d at 389. The net cost of a bare pole is determined by subtracting the depreciation reserve related to poles, the accumulated deferred taxes related to poles and the amount attributable to "non-cable-related investment" from the gross investment in pole plant and dividing this figure by the number of poles involved in the attachment. *See Alabama Power*, 773 F.2d at 365; *Hardware Attachment Amendments*, 2 F.C.C.Rcd. at 4388, 4402. Non-cable-related investment is rebuttably presumed to be 5 percent of net pole investment for telephone companies and 15 percent of net pole investment for power utilities. *Id.* at 4389-90. Finally, net pole investment equals gross pole investment minus the depreciation reserve related to poles minus the accumulated deferred income taxes related to poles. *Id.* at 4402.

53. 773 F.2d 362 (D.C. Cir. 1985).
54. *Id.* at 367-72.
55. *Id.* at 368-69.
56. *Id.* at 370-71. The court arrived at this conclusion because of the Commission's inconsistent prior decisions concerning the use of the normalized method for tax computation. *See* Texas Power & Light Co. v. F.C.C., 784 F.2d 1265, 1270-72 (5th Cir. 1986) (non-normalized taxed component is inconsistent with the depreciation component in the Commission's formula and results in inconsistent and arbitrary rates). *Compare* Television Cable Serv., Inc. v. Monongahela Power Co., 88 F.C.C.2d 56, 59 (1981) (denying the use of the normalized tax method) *with* Second Computer Inquiry, No. 81-893 (released May 15, 1985) (permitting the use of the normalized tax method).
57. The FCC has made the following adjustments to the rate formula: (1) Non-pole-related investment is rebuttably presumed to be 5 percent for telephone companies and 15 percent for power utilities; (2) a credit or offset for guys and anchors provided by a cable company will be allowed only where the cable operator demonstrates that the guy or anchor benefits the utility or other pole users and the cable operator is obligated to provide such equipment under an agreement with the utility pole owner; (3) a ratio of total administrative and general expenses to total plant investment will be used to determine the percentage of investment devoted to pole attachment administrative and general carrying charges; (4) a separate charge or fee for items such as application processing or maintenance inspection will be offset against the annual rental fee or credited to the cable company if these costs are found to be already included in the utilities carrying charges; (5) a normalized tax calculation will be employed in determining the operating expenses and capital costs of the utility incurred as a result of owning and maintaining its poles; and (6) the

The constitutional validity of the Pole Attachment Act came under scrutiny in *F.C.C. v. Florida Power Co.*[58] In *Florida Power*, the Supreme Court addressed the issue of whether the FCC rate determination formula amounted to an unconstitutional taking of property without just compensation.[59] Reversing the United States Court of Appeals for the Eleventh Circuit,[60] the Supreme Court found that the rate-limiting regulations of the Pole Attachment Act constituted neither a *per se* taking of the utilities property,[61] nor a taking under traditional fifth amendment standards.[62]

In deciding the *per se* taking issue, the Court compared the provisions of the Pole Attachment Act to the standards for a *per se* taking previously announced in *Loretto v. Teleprompter Manhattan CATV Corp.*[63] *Loretto* involved a New York statute which was held to constitute a *per se* taking because it required landlords to permit permanent occupation of their property by CATV companies.[64] The *Florida Power* Court, however, concluded that this *per se* rule was inapplicable to the Pole Attachment Act because the FCC did not *require* the power companies to provide pole attachment access to the CATV companies.[65]

The *Florida Power* Court next addressed the issue of whether the Pole Attachment Act effected a taking of property under traditional fifth amendment standards. Finding that the formula used by the FCC to determine the rate in question was not confiscatory,[66] the Court held that the FCC order was a permissible regulation of rents rather than a taking.[67]

Thus, the Pole Attachment Act grants broad powers of regulation to

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presumption that the rate calculated under the FCC formula is just and reasonable may be rebutted by presenting evidence, on a case-by-case basis, which demonstrates that the pole attachment contract contains particularly onerous provisions. *See Hardware Attachment Amendments*, 2 F.C.C.Rcd. at 4389-97; *In re* Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, No. 88-421 (released Jan. 9, 1989).

58. 480 U.S. 245 (1987).
59. *Id.* at 248-50.
60. Florida Power Co. v. F.C.C., 772 F.2d 1537 (11th Cir. 1985), *rev'd*, 480 U.S. 245 (1987) (*per curiam*).
61. *Florida Power*, 480 U.S. at 250-53.
62. *Id.* at 253-54.
63. 458 U.S. 419 (1982).
64. *Id.* at 425-41.
65. *Florida Power*, 480 U.S. at 252; *see also infra* note 69.
66. As long as the rates are not confiscatory, it is constitutionally permissible under the Fifth Amendment to limit the maximum rate chargeable from the use of private property for public concerns. *See* Permian Basin Area Rate Cases, 390 U.S. 747, 768-70 (1968).
67. *Florida Power*, 480 U.S. at 253-54; *cf.* Rural Tel. Coalition v. F.C.C., 838 F.2d 1307, 1313 (D.C. Cir. 1988) (allocation of 25% of local phone exchange costs to interstate jurisdiction did not constitute a confiscation of long-distance telephone carrier's property). For a detailed discussion of the *Florida Power* case, see Comment, *The Constitutionality of Pole Attachment Legislation: Not a Taking, But a Valid Regulation of Cable Television*, 17 SW. U.L. REV. 321 (1987).

the FCC for resolving pole attachment disputes. The legislative history of the Pole Attachment Act, however, indicates several restrictions on the scope of this authority. First, jurisdiction can be established only where space on utility poles has been reserved for communication facilities and is presently occupied by a communication system.[68] Second, the FCC does not have the authority to guarantee access to pole attachments for CATV systems, nor can it require a power utility to dedicate a portion of its poles for communication space.[69] Finally, the FCC arguably does not have the authority to involve itself directly in the agreements entered into between the parties. Rather, FCC involvement will occur only in terms of resolving disputes which the parties bring before it.[70]

2. State Preemption of FCC Jurisdiction

In addition to the jurisdictional limitations previously discussed, FCC authority can be preempted by individual state regulation. Congress has "recognized the 'inherent power of a State' to regulate pole attachment contracts and intended to provide a forum for litigation concerning such contracts only in cases where no state forum was available."[71]

Section 224(c) of the Pole Attachment Act provides the mechanism whereby states may obtain jurisdiction over the regulation of pole attachment agreements.[72] To preempt federal jurisdiction, each state must certify to the FCC that:

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68. *See In re* Amendment of Rules and Policies Governing the Attachment of Cable Hardware to Utility Poles, 2 F.C.C.Rcd. 4387, 4397-98, 4404 (1987); S. REP. NO. 580, *supra* note 4, at 15, 1978 U.S. CODE CONG. & ADMIN. NEWS at 123; 124 CONG. REC. 1598 (daily ed. Jan. 31, 1978) (remarks of Sen. Hollings); 47 C.F.R. § 1.1404(d)(1)-(2) (1988); *see also* Cable Information Serv., Inc. v. Appalachian Power Co., 81 F.C.C.2d 383, 391 (1980).

69. *See Florida Power*, 480 U.S. at 251 n.6 ("The language of the Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggest that Congress intended no such authorization."); *In re* Southern Bell Tel. & Tel. Co., 65 Pub. Util. Rep. 3d (PUR) 117 (Fla. Pub. Serv. Comm'n 1966); S. REP. NO. 580, *supra* note 4, at 15-16, 1978 U.S. CODE CONG. & ADMIN. NEWS at 123-24; *see also* Paragon Cable Tel., Inc. v. F.C.C., 822 F.2d 152, 154 n.3 (D.C. Cir. 1987) (court recognized, but did not decide, whether the FCC had authority to compel a utility to make pole attachment agreements); *cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (act which authorized a permanent physical occupation of property without just compensation was unconstitutional under the Fifth Amendment).

70. S. REP. NO. 580, *supra* note 4, at 15, 22, 1978 U.S. CODE CONG. & ADMIN. NEWS at 123, 130. *But see* 47 C.F.R. § 1.1403(a) (1988) (a utility is required to provide a CATV system operator with no less than 60 days notice prior to (1) removal of facilities or termination of any service to those facilities if the cause or the termination arises out of a rate, term or condition of a pole attachment, or (2) any increase in pole attachment rates).

71. Utah Cable Tel. Operators Ass'n v. Public Serv. Comm'n, 656 P.2d 398, 400 (Utah 1982).

72. 47 U.S.C. § 224(c)(1)-(3) (1982 & Supp. IV 1986).

(1) it regulates the terms, rates and conditions for pole attachments; and
(2) in so regulating, it has the authority to consider and does consider the interests of both the subscribers and the consumers of utility service.[73]

Further, the state must implement its regulatory authority by issuing effective rules and regulations,[74] and it must take final action on all complaints within a prescribed period of time.[75]

This certification procedure is designed to ensure that a forum is available for dispute resolution and that the state is willing and able to provide this forum. Thus, even if a state has the required authority, FCC certification will be denied if the state is not regulating or prepared to regulate upon request.[76] The FCC, however, does not have the authority to review the viability of the regulatory framework developed by the state, nor can it question a state's underlying base of authority.[77] Rather, these issues are left to judicial resolution within each particular state.

C. *The Battle for State Regulation*

The FCC may consider a petition for certification as conclusive of a state's preemptive authority to regulate, but the state which has received certification may still deny jurisdiction.[78] The individual state's responsi-

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73. *Id.* at § 224(c)(2)(A)-(B); *see also* 124 CONG. REC. 1598-99 (daily ed. Jan. 31, 1978) (remarks of Sen. Hollings).
74. 47 U.S.C. § 224(c)(3)(A) (Supp. IV 1986); *see also* The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 4, 98 Stat. 2779, 2801. The FCC requires that when a state requests certification, it must certify that its rates and regulations include a specific methodology, which has been made publicly available in the state, for regulating pole attachments. 50 Fed. Reg. 18,637, 18,656-57 (May 2, 1985). However, the Commission has found that it does not possess the authority to define the specific methodology to be followed by the states, nor the responsibility to determine whether the state's specific methodology comports with the requirements of section 224(c). *Id.* at 18,657.
75. 47 U.S.C. § 224(c)(3)(B)(i),(ii) (Supp. IV 1986); *see also* The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 4 , 98 Stat. 2779, 2801-02. A state public service commission must take final action on a pole attachment complaint within 180 days after the complaint is filed, or within the applicable period prescribed for such final action, if the prescribed period does not extend beyond 360 days after the filing of such complaint. 47 U.S.C. § 224 (c)(3)(B)(i),(ii) (Supp. IV 1986).
76. S. REP. NO. 580, *supra* note 4, at 17, 1978 U.S. CODE CONG. & ADMIN. NEWS at 125.
77. *Id.* The FCC may question a state certification request only where there is evidence that a party is unable to file a complaint with the state public service commission, or where the state public service commission fails to issue a determination on a complaint within 180 days of filing or within the period prescribed for final action in the state. *In re* Certification by the Louisiana Public Service Commission Concerning Regulation of Cable Television Pole Attachments, 1 F.C.C.Rcd. 522 (1986); 50 Fed. Reg. 18,637, 18,657 (May 2, 1985).
78. Five state courts have found that their public service commissions do not have authority to assert jurisdiction over pole attachment agreements. American Cable Tel., Inc. v. Arizona Pub. Serv. Comm'n, 143 Ariz. 273, 693 P.2d 928 (1983); Teleprompter Corp. v. Hawkins, 384 So.2d 648 (Fla. 1980); Illinois-Indiana Cable Tel.

bility is to determine whether or not it possesses sufficient authority to satisfy the certification requirements of the FCC.[79] This requires the state to examine its own regulatory body's statutory basis for asserting jurisdiction and for considering the needs of CATV subscribers and utility customers.[80] These examinations have produced mixed results; a number of states have allowed their public service commissions to regulate pole attachments,[81] while others have denied their commission's authority and returned the regulatory responsibility to the FCC.[82]

The rationale of the courts which permit their public service commissions to regulate pole attachments, in the absence of specific legislative authority,[83] is best espoused in *Louisiana Cablevision v. Louisiana Public Service Commission*.[84] In *Louisiana Cablevision*, the Louisiana Supreme Court found that because of the potential for pole attachments to disrupt the safe and continued delivery of electric and telephonic services to its citizens, Louisiana's public service commission's authority "must necessarily extend to . . . oversight of the growing use of utility poles for cable [attachment]."[85] Further, the court reasoned that the revenues generated by pole attachments directly affect a utility's calculation of rates, thereby bringing pole attachments within the public service commission's duty to ensure fair utility rates.[86]

Having concluded that the public service commission possessed the power to regulate the rates, terms and conditions of pole attachment agreements, the court analyzed whether the public service commission had authority to consider the interests of CATV subscribers.[87] The court

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Ass'n v. Public Serv. Comm'n, 427 N.E.2d 1100 (Ind. App. 1981); Chesapeake & Potomac Tel. Co. v. Maryland/Delaware Cable Tel. Ass'n, 310 Md. 553, 530 A.2d 734 (1987); *In re* New England Cable Tel. Ass'n, 126 N.H. 149, 489 A.2d 124 (1985).

79. *See supra* notes 72-77 and accompanying text.
80. Because pole attachment agreements involve utilities, the typical regulatory body is a public service commission or a public utilities commission. For purposes of this comment, public service commission will encompass both terms.
81. Seven state courts have found that their public service commissions have sufficient authority to assert jurisdiction over pole attachment agreements. Cable Tel. Co. v. Illinois Commerce Comm'n, 82 Ill. App.3d 814, 403 N.E.2d 287 (1980); Kentucky CATV Ass'n v. Volz, 675 S.W.2d 393 (Ky. Ct. App. 1983); Louisiana Cablevision v. Louisiana Pub. Serv. Comm'n, 493 So.2d 555 (La. 1986); Consumers Power Co. v. Telesystems, Inc., 96 Mich. App. 1, 292 N.W.2d 472 (1980); Las Cruces TV Cable v. New Mexico Corporate Comm'n, 102 N.M. 720, 699 P.2d 1072 (1985); General Tel. Co., v. Public Serv. Comm'n, 63 A.D.2d 93, 406 N.Y.S.2d 909 (1978); Utah Cable Tel. Operators Ass'n v. Public Serv. Comm'n, 656 P.2d 398 (Utah 1982).
82. *See supra* note 78.
83. *See, e.g.*, Utah Cable Tel. Operators Ass'n v. Public Serv. Comm'n, 656 P.2d 398 (Utah 1982) (legislation specifically granting authority to their public service commission for the regulation of pole attachment agreements).
84. 493 So.2d 555 (La. 1986).
85. *Id.* at 558; *see also Kentucky CATV*, 675 S.W.2d at 396-97; *General Tel.*, 63 A.D.2d at 97, 406 N.Y.S.2d at 912.
86. *Louisiana Cablevision*, 493 So.2d at 558; *see also Kentucky CATV*, 675 S.W.2d at 396; *General Tel.*, 63 A.D.2d at 97, 406 N.Y.S.2d at 911-12.
87. *Louisiana Cablevision*, 493 So.2d at 558.

found that the authority to regulate pole attachments existed within the commission's responsibility to ensure just and reasonable rates for utilities. This responsibility required the public service commission to balance the interests of the CATV subscribers with those of the utility customers.[88] With both provisions of the FCC certification requirements satisfied, the court concluded that the public service commission had successfully preempted federal jurisdiction for pole attachment regulation.[89]

Although a common rationale developed among those states which have asserted jurisdiction over pole attachment disputes, the disparity in the underlying grant of power to each state's public service commission has contributed to a greater divergence in rationale among those states which have denied jurisdiction. Nonetheless, several dominant themes have been followed by state courts which have concluded that their regulatory bodies lacked authority to regulate pole attachments. These themes are best exemplified in *Illinois-Indiana Cable Television Ass'n v. Public Service Commission*.[90] Echoing the rationale employed by state courts in pre-Pole Attachment Act cases,[91] the court found that the attachment of cable to utility poles was not sufficiently related to the business of producing electric and telephonic services to be considered a public utility service and, therefore, was outside the realm of their public service commission's jurisdiction.[92] The court added that although the public service commission had authority to regulate pole attachments in order to "ensure the safe operations of a utility and to ensure uninterrupted service," the current practice of attaching cable to utility poles presented no such dangers.[93] As further support for its position, the court explained that the decision to regulate pole attachments was a leg-

88. *Id.* at 558-59; *see also Kentucky CATV*, 675 S.W.2d at 397.

89. *Louisiana Cablevision*, 493 So.2d at 559. The Louisiana Supreme Court did not address the issue of whether the Louisiana public service commission had made effective rules and regulations implementing its regulatory authority over pole attachments. *See supra* notes 74-75 and accompanying text. The FCC, however, in *In re* Certification by the Louisiana Public Service Commission Concerning Regulation of Cable Television Pole Attachments, 1 F.C.C.Rcd. 522 (1986), found that there was no allegation of an inability to file a complaint with the Louisiana public service commission nor was there any evidence that a complaint had been pending with the commission longer than the 180-day period. *Id.* The FCC concluded, therefore, that the request was proper and pole attachment jurisdiction would vest with the Louisiana public service commission. *Id.*

90. 427 N.E.2d 1100 (Ind. App. 1981).

91. *See supra* text and accompanying notes 35-39.

92. *Illinois-Indiana Cable*, 427 N.E.2d at 1109-11; *see also* Chesapeake & Potomac Tel. Co. v. Maryland/Delaware Cable Tel. Ass'n, 310 Md. 553, 561-64, 530 A.2d 734, 738-39 (1987) ("[T]he use of utility poles for the suspension of cable television lines is not an essential service provided to the entire public, but is instead an incidental service provided to only a few private parties. Consequently, it is not a 'public utility service.' "); American Cable Tel., Inc. v. Arizona Pub. Serv. Comm'n, 143 Ariz. App. 273, 278, 693 P.2d 928, 933 (1983) ("[W]e do not find that pole attachment licenses granted by [a utility company] are public utility services.").

93. *Illinois-Indiana Cable*, 427 N.E.2d at 1107.

islative, rather than a judicial determination.[94] As a final basis for denying jurisdiction, the court noted the availability of a federal forum for the resolution of the disputes between the parties.[95] Consequently, the petitioners were required to litigate their pole attachment claim at the federal level.[96]

Thus, the Pole Attachment Act has succeeded in assuring that at least one forum will be available for the resolution of pole attachment disputes. Similarly, the Act's rate determination formula has ameliorated some of the anticompetitive potential surrounding pole attachment agreements. The Pole Attachment Act, however, has not proven successful in assuring pole access to CATV operators in all cases. Instead, the CATV industry has had to rely upon rules which prohibit telephone company participation in the CATV business to minimize the pole access problem.

III. TELEPHONE COMPANY-CABLE TELEVISION CROSS-OWNERSHIP RULES

A. Regulation of Channel Service Offerings

For more than twenty years, the FCC has found it necessary to regulate telephone company involvement in the cable television industry. The cross-ownership rules,[97] which presently prohibit telephone companies from providing cable television within their service areas, however, were not the genesis of this regulatory intervention. Rather, the cross-ownership rules evolved from the FCC's regulation of cable distribution services furnished by the telephone companies to CATV operators.

The FCC began its regulation of cable distribution service in April 1966 when it directed several telephone companies to file tariffs for channel service offerings made to CATV operators.[98] Channel service offer-

94. *Id.* at 1112; *see also* Teleprompter Corp. v. Hawkins, 384 So.2d 648, 650 (Fla. 1980) (" '[C]ommunity antenna television systems have never been defined as 'public utilities' by the legislature, nor is there anything . . . which would justify the conclusion that such systems are vested with a public interest; in actual fact, they may be of such character as to justify public regulation and control. That, however, is a matter for determination by the state legislature.' ") (quoting *In re* Southern Bell Tel. & Tel. Co., 65 Pub. Util. Rep.3d (PUR) 117, 119-20 (Fla. Pub. Serv. Comm'n 1966)).

95. *Illinois-Indiana Cable*, 427 N.E.2d at 1112. The court's reliance on the availability of a federal forum as a basis for denying jurisdiction is misplaced. The legislative history of the Pole Attachment Act reveals that Congress intended that state governments should have the sole responsibility for regulatory oversight of pole attachment agreements. *See* S. REP. NO. 580, *supra* note 4, at 16, 1978 U.S. CODE CONG. & ADMIN. NEWS at 124. Further, the legislative history indicates that federal involvement in pole attachment regulation was justified only because uniform state regulation did not exist. *Id.* at 17, 1978 U.S. CODE CONG. & ADMIN. NEWS at 125.

96. When a state which has received FCC certification subsequently denies that it has authority to regulate pole attachments, regulatory responsibility reverts to the FCC. *See* Consumers Power Co. v. Telesystems, Inc., 96 Mich. App. 1, 292 N.W.2d 472, 474 (1980).

97. 47 C.F.R. §§ 63.54-63.58 (1988); *see also supra* note 7 and accompanying text.

98. The tariffs required telephone companies to provide information relating to the type

ings are leasing arrangements wherein telephone companies provide the distribution equipment necessary for cable distribution and furnish channels of communication to CATV operators.[99] Although the telephone carriers responded to the tariffs, they challenged the jurisdictional basis upon which the FCC required such filings.[100] The FCC, however, affirmed its jurisdictional authority to require the tariffs. It reasoned that the offering of channels of communication to CATV operators constituted interstate communication and, therefore, came within its jurisdiction as a "common carrier" service.[101]

Shortly after finding that it possessed sufficient authority to require the tariffs, the FCC instituted investigations into the lawfulness of the tariffs filed by several telephone companies.[102] The scope of inquiry included investigation into whether section 214 of the Communications Act of 1934, which requires that telephone companies obtain a certificate of public convenience and necessity from the FCC prior to constructing or extending any communication lines, applied to telephone companies that provided channel service offerings.[103] This issue was resolved by the

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of service offered and the charges imposed for such service. The service offered was the non-exclusive transmission of television and FM radio programming from the CATV's headend equipment to the subscriber's homes. Charges for the service were based on the length of cable carrying the transmission and on the number of cable drops to subscriber's homes. *In re* General Tel. Co., 13 F.C.C.2d 448, 450 (1968), *aff'd sub nom.* General Tel. Co. v. F.C.C., 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

99. *See supra* note 5 and accompanying text.

100. *See In re* Common Carrier Tariffs for CATV Systems, 4 F.C.C.2d 257 (1966).

101. *Id.* at 259-60; *see also* 47 U.S.C. § 152(a) (1982 & Supp. IV 1986) (FCC jurisdiction extends "to all interstate and foreign communication by wire or radio. . . ."); *Id.* § 153(h) (1982) ("common carrier" means any person engaged for hire in interstate or foreign communication by wire or radio); *Id.* § 202(b) (1982) (FCC has authority over "services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities . . . or incidental to radio communication of any kind.").

102. *See In re* The General Tel. System, 6 F.C.C.2d 434 (1967); *In re* The Associated Bell System Companies, 5 F.C.C.2d 357 (1966); *In re* California Water & Tel. Co., 5 F.C.C.2d 229 (1966). The investigations were subsequently consolidated for hearing. *See In re* California Water & Tel. Co., 6 F.C.C.2d 440 (1967); *In re* California Water & Tel. Co., 6 F.C.C.2d 441 (1967).

103. Communications Act of 1934, ch. 652, title I, § 214, 48 Stat. 1064, 1075-76 (codified at 47 U.S.C. § 214 (1982)). Section 214 provides:

> (a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment
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> No carrier shall undertake the construction of a new line or of a extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired

Commission in *In re General Telephone Co.*[104]

In *General Telephone*, the Commission first addressed the issue of whether it possessed jurisdiction over channel service offerings when the reception and transmission facilities utilized in the offerings were located entirely within one state.[105] Noting that CATV was considered interstate communication because it facilitated the interstate transportation of television signals,[106] the Commission observed that this was true even where the broadcast signals " 'emanate from stations located within the same state in which the CATV system operates.' "[107] Accordingly, the Commission found that because channel service offerings were links in the transmission of broadcast signals from the point of origin to the subscriber's home, telephone companies who provide these offerings, irrespective of the location of their facilities, were performing an interstate communication service.[108]

With its jurisdictional authority established, the Commission next considered whether there were any exceptions that would exempt telephone companies from the requirements of a section 214 certificate of public convenience and necessity.[109] The telephone companies claimed that because the lines employed in channel service offerings did not cross

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under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

47 U.S.C. § 214(a) (1982).

104. 13 F.C.C.2d 448 (1968), *aff'd sub nom.*, General Tel. Co. v. F.C.C., 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). Because of administrative procedure, the section 214 issue was deleted from the consolidated proceeding and a separate proceeding was initiated to resolve this issue. *See In re* California Water & Tel. Co., 7 F.C.C.2d 571 (1967); *In re* California Water & Tel. Co., 7 F.C.C.2d 575 (1967).

105. *General Tel.*, 13 F.C.C.2d at 460-61.

106. *Id.* at 454-55; *see also* Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220, 225 (1967) (CATV systems facilities are a "link in the interstate transportation of television signals.")

107. *General Tel.*, 13 F.C.C.2d at 454-55 (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968)).

108. *Id.* at 455.

109. *Id.* at 456-461.

state boundaries, section 214(a)(1)'s exclusion of "a line within a single state unless such line constitutes a part of an interstate line" exempted them from the requirements of section 214.[110] The Commission rejected this argument based on section 214's definition of a line as "any channel of communication established by the use of appropriate equipment."[111] The telephone companies further argued that even if section 214(a)(1) did not exempt them from section 214, they were exempt under section 214(a)(2). Section 214(a)(2) excludes "local, branch, or terminal lines not exceeding ten miles in length" from the requirements of section 214.[112] The Commission found that section 214(a)(2) was not applicable because channel service offerings were a new service rather than a modification of existing services.[113] Consequently, the Commission concluded that a section 214 certification was necessary before the telephone companies could provide channel service offerings to independent CATV systems.

Subsequent requests for section 214 certification quickly revealed to the Commission the extensive affiliation that existed between CATV operators and telephone companies.[114] The Commission expressed concern over such common ownership in *General Telephone*, where it stated:

> By reason of its control over utility poles, or other local advantages resulting from its status as an existing common carrier in the community, the telephone company is in a position to preclude or to substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition. Furthermore, construction by a telephone company for an affiliated CATV operator calls for careful scrutiny on the part of the commission in order to insure against wasteful duplication or unnecessary construction.[115]

As a result, the Commission initiated inquiry and proposed rule-making into whether telephone companies, either directly or through affiliates, should be permitted to provide cable television service.[116]

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110. *Id.* at 457; *see also supra* note 103.

111. *General Tel.*, 13 F.C.C.2d at 457-58.

112. 47 U.S.C. § 214(a)(2) (1982); *see also supra* note 103.

113. *General Tel.*, 13 F.C.C. at 459.

114. Common ownership between telephone companies and CATV systems became apparent from the first petitions that were filed for section 214 certification. In each petition, some degree of ownership affiliation was found to exist. *See* Applications of Telephone Companies for Certain Certificates for Channel Facilities, 34 Fed. Reg. 6,290, 6,291 (1969).

115. *General Tel.*, 13 F.C.C.2d at 463.

116. *See In re* Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 15 F.C.C.2d 417, 441-42 (1968); Applications of Telephone Companies for Certain Certificates for Channel Facilities, 34 Fed. Reg. 6,290 (1969).

B. Development of the Cross-Ownership Rules

In *In re Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*,[117] the FCC considered a variety of issues regarding the necessity of prohibiting telephone company-CATV cross-ownership. The CATV companies claimed that a prohibition against cross-ownership was needed because telephone companies were engaged in various anticompetitive practices which threatened the viability of independent CATV service.[118] For example, CATV operators asserted that telephone companies were subsidizing their affiliated CATV operations in an effort to undercut the prices offered by independent systems.[119] They also alleged that telephone companies were arbitrarily refusing to grant pole space to independent CATV systems in order to eliminate competition with their own affiliated systems.[120]

In response, the telephone companies denied any discriminatory treatment towards unaffiliated CATV operators and objected to being singled out from other owners of CATV systems for special conditions and restrictions.[121] In addition, the telephone companies contended that their utility poles were private property and, therefore, they were under no obligation to make pole space available for unaffiliated systems.[122]

Upon reviewing the arguments of the parties, the FCC found that there was an "anomalous competitive situation" between CATV systems owned by, or affiliated with telephone companies, and independent cable television systems which relied upon the telephone companies for channel service offerings or access to pole attachments.[123] This anomalous situation developed from the telephone companies' natural monopoly over the utility pole lines required for CATV distribution.[124] The Commission reasoned that because of this market power, the potential for telephone companies to favor affiliated CATV systems over independent operators necessitated governmental intervention.[125] As a further indication of need for regulation, the Commission noted that telephone company ownership of CATV services "not only tends to exclude others from entry into that service, but also tends to extend, without need or justification, the telephone company's monopoly position to broadband

117. 21 F.C.C.2d 307, *reconsidered in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).
118. *Id.* at 311-13.
119. *Id.* at 311.
120. *Id.* The CATV companies cited other alleged anticompetitive practices, such as manipulating community leaders to secure CATV franchises, exerting pressure upon independent CATV operators to force them to accept more expensive distribution systems, and charging rates for pole attachments which were unrelated to the cost of providing such services. *Id.* at 311-12.
121. *Id.* at 310.
122. *Id.* at 311.
123. *Id.* at 323.
124. *Id.* at 324.
125. *Id.*

cable facilities and the new and different services such facilities are expected to be providing in the future."[126] Accordingly, the Commission concluded that the public interest would best be served by prohibiting telephone companies from engaging in the sale of CATV service within their telephone service areas.[127]

To implement its findings, the Commission amended part 63 of its rules to include the telephone company-cable television cross-ownership rules.[128] The rules prevent telephone companies from providing channel service offerings or pole attachment agreements to controlled or affiliated CATV systems within their telephone service areas.[129] The cross-ownership rules also require telephone companies to offer CATV systems the alternative of pole attachment rights before providing a channel distribution service.[130]

The FCC's decision to adopt the cross-ownership rules was appealed to federal court. In *General Telephone Co. v. United States*,[131] the Court of Appeals for the Fifth Circuit considered whether the FCC had statutory authority to adopt the cross-ownership rules, and whether the rules deprived the telephone companies of any rights in violation of the Constitution. Addressing the statutory authority issue, the court noted that the FCC had a responsibility to " 'make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . .' "[132] The court reasoned that development of CATV service on a national level fell within this responsibility and, therefore, the FCC had the authority to foster CATV growth by limiting

126. *Id.* The Commission noted that broadband cable could provide a broader range of service than could be provided on traditional telephonic service, such as data storage, distribution and retrieval, and facsimile transmissions. *Id.* at 324-25; *see also* General Tel. Co. v. United States, 449 F.2d 846, 851 n.1 (5th Cir. 1971).

127. *Applications for Section 241 Certificates*, 21 F.C.C.2d at 325-26.

128. 47 C.F.R. § 63.54-63.58 (1988).

129. *Id.* § 63.54(b). The rules provide that the terms "affiliates" and "control" bar any financial or business relationship between a telephone company and a CATV system. *Id.* § 63.54 n.1(a). For example, the following relationships are within the definitions of control and affiliate: (1) A debtor-creditor relationship except with respect to communication services; (2) interlocking officers, directors or other employees at the management level; and (3) common ownership by one company in the other. *Id.* § 63.54 n.1(b); *see also id.* § 63.54 n.2 (provisions for determining common ownership in corporations with more than 50 stockholders). Telephone companies must demonstrate the lack of control over, or affiliation with, the CATV systems as a prerequisite to receiving a section 214 certificate for constructing or operating a channel distribution service. *Id.* § 63.55.

130. *Id.* § 63.57. The offer of a pole attachment right must exist both at the time of section 214 certification as well as at the time when the CATV operator seeks a local franchise. *Id.* The offer must be reasonable with respect to the charges for the pole attachment and must not unduly restrict the uses that may be made of the channel by the CATV operator. *Id.*; *see also supra* note 23.

131. 449 F.2d 846 (5th Cir. 1971).

132. *Id.* at 854 (quoting 47 U.S.C. § 151 (1982)).

the involvement of telephone companies in CATV service.[133]

With respect to the constitutional issues, the telephone companies claimed that the CATV service prohibition in the rules was not reasonably related to the goal of ensuring national distribution of cable television.[134] The court concluded that the cross-ownership rules were neither arbitrary nor unreasonable because telephone companies had monopoly power over CATV distribution systems.[135] Moreover, the court noted that telephone companies were not completely prevented from entering the CATV market; rather, they were only prohibited from providing CATV service *within their own telephone service areas.*[136]

The telephone companies also argued that requiring an offer of pole space as a prerequisite for receiving permission to construct channel service facilities[137] deprived them of their property without due process of law.[138] In rejecting this argument, the court reasoned that there was no deprivation of property because telephone companies only were required to offer pole space when they *voluntarily* engaged in offering channel service facilities.[139] The requirement of offering pole space was simply a reasonable condition to entry into the CATV market rather than an unconstitutional taking.[140]

C. *Exceptions to the Cross-Ownership Rules*

In its effort to ensure that CATV would be available to as wide a viewing public as possible, the FCC included several exceptions to the cross-ownership restrictions. Foremost among these exceptions is section 64.56(a).[141] This section provides that where it can be demonstrated that CATV service could not exist except through common ownership, or upon a general showing of good cause, the cross-ownership rules will

133. *Id.* at 854-55. The telephone industry also argued that the FCC's reliance on antitrust principles in formulating the cross-ownership rules was beyond its authority. The court rejected this argument by finding that the "public convenience and necessity" standard of section 214 was sufficiently broad to permit the Commission to consider the anticompetitive potential of television company-CATV cross-ownership. *Id.* at 856-58; *see also* United States v. Radio Corp. of Am., 358 U.S. 334, 351-52 (1959) (antitrust considerations alone may be sufficient for the FCC to find that statutory standards could not be met).

134. *General Tel.*, 449 F.2d at 859. The court categorized the issue as "whether the rules comport with the requirements of substantive due process." *Id.*

135. *Id.*

136. *Id.* at 859-60; *see also* 47 C.F.R. §§ 63.54, 64.601 (1988); *In re* Blanket Section 214 Authorization for Provision by a Telephone Carrier of Lines for its Cable Television and Other Non-Common Carrier Services Outside its Telephone Service Area, 49 Fed. Reg. 21,333 (1984) (blanket section 214 permission to provide channel service offerings outside of television service area).

137. *See* 47 C.F.R. § 63.57 (1988).

138. *General Tel.*, 449 F.2d at 860-61.

139. *Id.* at 860. A similar analysis was employed by the Supreme Court in F.C.C. v. Florida Power Co., 480 U.S. 245 (1987), to determine the constitutional validity of the pole attachment rules. *See supra* notes 58-67 and accompanying text.

140. *General Tel.*, 449 F.2d at 860.

141. 47 C.F.R. § 64.56(a) (1988).

be waived if such waiver is found by the Commission to be in the public interest.[142]

In 1978, the Commission initiated an investigation to determine if the procedures for obtaining a cross-ownership waiver could be streamlined.[143] As a result of this investigation, the Commission facilitated the procedure for obtaining waivers by creating a rebuttable presumption that CATV service could not exist except through common ownership where it was demonstrated that the waiver was consistent with the public interest and that the proposed service area contained fewer than thirty homes per route mile of coaxial cable.[144] In a subsequent proceeding, the FCC further extended the exceptions to the cross-ownership rules by adopting an exemption for rural areas.[145] Under this exclusion, telephone companies are exempt from the cross-ownership rules where the proposed service contains fewer than 2,500 inhabitants.[146]

D. Relaxing the Cross-Ownership Rules

In 1984, Congress enacted the Cable Communications Policy Act[147] ("Cable Policy Act") to clarify and define the respective responsibilities of federal and state governments over the regulation of cable television. Section 533 of the Cable Act, entitled "Ownership Restrictions," effectively incorporated the FCC's cross-ownership rules into the statutory framework.[148] By enacting this section, Congress implicitly recognized

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142. *Id.*; *see also In re* Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television Cross-Ownership Rules, 69 F.C.C.2d 1097, 1110 (1978) (clarification of what constitutes "good cause" under section 64.56(a)); *In re* Applications of Telephone Companies For Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 22 F.C.C.2d 746, 750 (1970).

143. *See In re* Clarification and Notice of Proposed Rulemaking, 69 F.C.C.2d 1097 (1978).

144. *See* 47 C.F.R. § 63.56(b) (1988); *In re* Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross Ownership Rules," Sections 63.54 and 64.601 of the Commission's Rules and Regulations, 82 F.C.C.2d 233, 242-44 (1979). Telephone companies must also submit affidavits verifying the assertions made in the waiver requests. 47 C.F.R. § 63.56(b)(4) (1988). The presumption provided in section 63.56(b) may be rebutted by a showing that more than thirty homes are contained in the service area or that the opposing party has a present intention to offer non-affiliated cable service. *Id.* § 63.56(d)(1),(2).

145. *In re* Elimination of the Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.56 for Rural Areas, 88 F.C.C.2d 564 (1981); *see also* Notice of Proposed Rulemaking in the Elimination of the Telephone Company-Cable Television Cross-Ownership Rules for Rural Areas, 84 F.C.C.2d 335 (1981).

146. 47 C.F.R. § 63.58 (1988). When first enacted, the rural exception did not apply where a competing cable television system was under construction or already in existence. *Elimination of the Telephone Company-Cable Television Cross-Ownership Rules*, 88 F.C.C.2d at 576. This restriction, however, was eliminated by the Cable Communications Policy Act of 1984. *See* H.R. REP. No. 934, *supra* note 10, at 56, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4693-94.

147. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

148. *Compare* 47 U.S.C. § 533(b)(1)-(2) (Supp. IV 1986) *with* 47 C.F.R. § 63.54(a)-(b) (1988). The Cable Policy Act also directed the FCC to adopt implementing regula-

the continued need for prohibiting affiliation between telephone companies and CATV systems.[149] Less than five years later, however, the FCC found it necessary to re-examine the cross-ownership rules to determine whether the original justifications for these rules were still valid.[150]

The Commission addressed the continued viability of the cross-ownership rules by examining the rules in light of the current market place conditions confronting the CATV industry.[151] From its investigation, the Commission found that because approximately eighty percent of the nation was CATV ready, much of the anticompetitive potential which originally prompted the need for the cross-ownership rules was no longer present.[152] For example, telephone companies could no longer obtain the economic and competitive advantage of being the first CATV provider in the area.[153] Similarly, the emergence of several large CATV networks lessened the need to protect the CATV industry from potential competitors.[154] Accordingly, the Commission tentatively concluded that a flat ban on television-cable affiliation was no longer necessary to protect the mature CATV industry.[155]

IV. MANDATORY ACCESS TO POLE ATTACHMENTS

A. The Need for Pole Access Regulation

In the same breath in which it tentatively concluded to relax the cross-ownership rules, the Commission acknowledged that the CATV in-

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tions for section 533. The FCC responded by adopting regulations which were essentially the same as the cross-ownership rules. *See* Amendments of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637 (1985). *But see supra* note 146.

149. *See* H.R. REP. NO. 934, *supra* note 10, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4693 ("[T]he intent of section [533(b) was] to codify current FCC rules concerning the provision of video programming over cable systems by common carriers. . . .").
150. *See In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 2 F.C.C.Rcd. 5092 (1987) (notice of inquiry).
151. *See In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 F.C.C.Rcd. 5849, 5881-54 (1988).
152. *Id.* at 5853; *see also supra* note 10.
153. *Cross-Ownership Rules*, 3 F.C.C.Rcd. at 5853. This reasoning, however, may not be true with respect to new broadband services (*i.e.*, data distribution, facsimile transmission) which is just developing. Because telephone companies have existing plant and facilities which could be adapted in a relatively short time to provide these services, they have the ability to enter the broadband services market very rapidly. Consequently, they would secure the market efficiencies that come with being the first provider in an area.
154. *Id.* The Commission found that the lack of competition in the CATV industry had stifled the development of additional broadband services. By permitting telephone companies to compete in the CATV business, a greater variety of choices for consumers would result. *Id.* at 5857-58.
155. *Id.* at 5853. Significantly, the Commission did not contemplate disposing of the cross-ownership rules altogether. Rather, it simply proposed to relax the standards with respect to what constituted "ownership" or "control" for purposes of the rules. *See id.* at 5868-69 (Appendix II).

dustry's growth had not completely eliminated the potential for predatory practices by telephone companies. Consequently, the Commission indicated that it might implement rules which would require telephone companies to provide equal access to pole space as a prerequisite for entering the CATV business.[156] Indeed, new regulations which mandate access to pole attachments may very well be necessary.[157] Before adopting such rules, however, the present regulatory framework that governs cable television should be examined to determine if existing rules could provide the needed protection.

Under the current regulatory scheme that governs cable television, two distinct regulations may ensure that CATV operators will have access to pole attachments. The first regulation is section 224(b) of the Pole Attachment Act which gives the Commission the authority to ensure that the rates charged for pole attachments are just and reasonable.[158] Section 224(b)(1) can be utilized to compel access in a limited number of situations. For example, if a utility pole owner discontinues providing communication space solely to avoid FCC jurisdiction, the FCC could claim jurisdiction based on an unreasonable practice.[159] Similarly, termination of a pole attachment agreement in retaliation for a CATV operator's complaint to the Commission can be set aside as an unreasonable practice.[160]

Section 224(b)(1), however, does not directly require utilities to provide space for pole attachments.[161] This section also does not prohibit a telephone company from terminating a pole attachment agreement, or allowing an agreement to expire, where the telephone company can demonstrate a reasonable explanation for the action.[162] If telephone companies are permitted to compete in the CATV business, a higher rental offer for pole space by an affiliated CATV system may constitute a reason for refusing to renew an independent CATV operator's pole attachment agreement. Consequently, section 224(b) of the Pole Attachment Act does not satisfactorily ensure access to pole attachments for independent CATV operators.

The second regulation which may guarantee access to pole space is section 541(a)(2) of the Cable Policy Act.[163] This section provides:

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156. *Id.* at 5859-60.
157. *See infra* notes 184-193 and accompanying text.
158. 47 U.S.C. § 224(b)(1) (1982).
159. *See* Cable Information Serv., Inc. v. Appalachian Power Co., 81 F.C.C.2d 383, 391 n.8 (1980); S. REP. NO. 580, *supra* note 4, at 16, 1978 U.S. CODE CONG. & ADMIN. NEWS at 124. The FCC, however, will not grant relief upon an alleged unreasonable denial of pole attachment access where a CATV operator does not hold a valid cable television franchise. Paragon Cable Tel., Inc. v. F.C.C., 822 F.2d 152, 153-54 (D.C. Cir. 1987).
160. *See Cross-Ownership Rules*, 3 F.C.C.Rcd. at 5871 n.16.
161. *See supra* note 69 and accompanying text.
162. *See supra* notes 68-70 and accompanying text.
163. Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2786 (codified at 47 U.S.C. § 541(a)(2) (Supp. IV 1986)).

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses. . . .[164]

Section 541(a)(2) appears to grant a franchised CATV operator a right of access to utility poles that occupy a public right-of-way.[165] Similarly, the section arguably grants a right of access to any pole that occupies an easement, whether public or private, as long as the easement is dedicated for compatible use. This latter conclusion is supported by statutory provisions following section 541(a)(2) that require the CATV operator to compensate the owner of the property for use of the easement.[166] The legislative history of the Cable Policy Act indicates that these provisions may have been included to avoid the taking proscriptions of the Fifth Amendment.[167] Section 633 of the House version of the Cable Policy Act, which required landlords to provide access to their property for CATV attachment, contained language substantially similar to the language used in section 541(a)(2)(A)-(C).[168] In analyzing this section, the drafters of the Cable Policy Act acknowledged that the section was designed to avoid the unconstitutional taking problem in *Loretto v. Teleprompter Manhattan CATV Corp.*[169] *Loretto* involved a statute which required New York landlords to permit CATV hookups to their property.[170] The Supreme Court found that this statute authorized a taking of property for which just compensation was due.[171]

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164. 47 U.S.C. § 541(a)(2) (Supp. IV 1986).

165. *See* H.R. REP. NO. 934, *supra* note 10, at 59, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4969; *see also* Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871 (N.D. Ga. 1986) (Congress intended section 541(a)(2) to create a right of access).

166. These provisions provide that in using the easements, the CATV operator shall ensure:

> (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

47 U.S.C. § 541(a)(2)(A)-(C) (Supp. IV 1986).

167. The takings clause of the Fifth Amendment provides:

> Nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

168. *See* H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* H.R. REP. NO. 934, 98th Cong., 2d Sess. 13 (1984).

169. 458 U.S. 419 (1982); *see* H.R. REP. NO. 934, *supra* note 10, at 79-81, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4716-18.

170. *Loretto*, 458 U.S. at 421-25; *see also supra* text accompanying note 64.

171. *Loretto*, 458 U.S. at 425-41; *see also supra* text accompanying notes 63-65.

Section 633, however, was deleted from the enacted version of the Cable Act.[172] Although the significance of the deletion of section 633 is debatable, it can be argued that the provisions of section 633 were transferred and preserved in section 541(a)(2). Thus, by requiring compensation to be paid to the owners of the easements, it can be inferred that the drafters of section 541(a)(2) contemplated that this section would mandate access and, therefore, would authorize a taking. Under such a view, "easement" as used in section 541(a)(2) includes both public and private easements.[173] Furthermore, in light of the Cable Policy Act's express purpose of encouraging the growth and development of CATV systems,[174] it is reasonable to conclude that section 541(a)(2) is intended to grant a right of access to pole space on poles that occupy public rights-of-way as well as *private* easements that are dedicated to compatible uses.

The FCC, however, maintains that section 541(a)(2) does not guarantee access to pole space in all cases; rather, this section simply permits CATV operators to use the same rights-of-way and easements that telephone companies utilize.[175] Indeed, nowhere in section 541(a)(2) is there explicit language which requires telephone companies to give over a portion of their pole or conduit space to CATV systems.[176] Moreover, the subsections that require just compensation can be narrowly construed as requiring compensation only in the event that a CATV operator damages the telephone companies' property when installing its own poles or conduits, rather than as requiring compensation for a taking.[177] The deletion of section 633 from the enacted version of the Cable Policy Act arguably supports a narrow construction of the compensation provisions of section 541(a)(2). Although section 633 contained compensation lan-

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172. *Cf.* 47 U.S.C. § 541(e) (Supp. IV 1986).

173. *See* Centel Cable TV v. Admiral's Cove Assoc., 835 F.2d 1359 (11th Cir. 1988) (CATV system had implied right of action under section 541(a)(2) to enforce a claimed right to provide CATV service to residential community); Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc., 706 F. Supp. 422 (D. Md. 1989). *See generally* Rollins Cablevue, Inc. v. Saienni Enterprises, 633 F. Supp. 1315 (D. Del. 1986); Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires,* 19 GA. L. REV. 543, 610-12 (1985).

174. *See* 47 U.S.C. § 521(2) (Supp. IV 1986); *see also* H.R. REP. NO. 934, *supra* note 10, at 59, 1984 U.S. CODE CONG. & ADMIN. NEWS at 4969 ("[A]ny private arrangement which seeks to restrict a cable system's use of such easements or rights of way which have been granted to other utilities are in violation of [section 541(a)(2)] and not enforceable.").

175. *See In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 F.C.C.Rcd. 5849, 5854, 5871 n.17 (1988).

176. *See supra* text accompanying note 164.

177. *See supra* note 166. A narrow construction of the compensation requirements in section 541(a)(2) is logical in light of the applicability of the Pole Attachment Act. Once the CATV operators receive pole space, the compensation for access is governed by the rate formula provisions of the Pole Attachment Act. *See supra* notes 47-57 and accompanying text. Thus, if the compensation requirements of section 541(a)(2) are construed as requiring compensation for access to telephone company poles rather than damages incurred by CATV operators utilizing the public easements, the rate provisions of the Pole Attachment Act would be superfluous.

guage similar to that contained in section 541(a)(2)(A)-(C), its language was much broader.[178] Section 633 included a provision which would have required the FCC or a state agency to create regulations for ensuring that just compensation was provided for use of the landlord's property. In contrast, section 541(a)(2) provides that just compensation is to be ensured by the cable operator and is required only in the event of damages.[179] Because it is questionable whether section 541(a)(2) satisfies the just compensation requirements of the Constitution, it can be argued that had Congress intended for section 541(a)(2) to authorize a taking it would have included the broader compensation language of section 633.[180]

Section 541(a)(2) can also be construed as compelling access only where the utility poles are occupying public rights-of-way or *public* easements.[181] It can be inferred that by deleting section 633 from the Cable Policy Act, Congress implicitly rejected the creation of a right of access to private property. Therefore, section 541(a)(2)'s use of the word easement means a public, rather than a private, easement.[182] Under such an interpretation, telephone companies could not be required to provide pole access to a competing CATV operator unless every pole in a particular service area occupied a public right-of-way or a public easement. Accordingly, telephone companies would be able to deny access where their poles were located on private property, regardless of whether the easement was dedicated to a compatible use.

If the FCC is correct in construing section 541 so as to deny a general right of access to pole space, the present regulatory framework which governs CATV is clearly insufficient to prevent telephone companies from manipulating their control over access to utility poles. But even if the FCC is incorrect and section 541 does guarantee a right of access to pole space, the potential for predatory pole access practices will still exist. Because section 541 does not guarantee that telephone companies will provide *equal* access to pole space, these companies would be able to manipulate pole access to their affiliates' advantage. For example, if a telephone company gives the last remaining space on its poles to an affiliated CATV system, their easement would no longer be dedicated for compatible use and section 541 would not be applicable.[183] Thus, irre-

178. *See* H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* H.R. Rep. No. 934, 98th Cong., 2d Sess. 13 (1984).

179. *See supra* note 166.

180. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151, 157-58 (3rd Cir. 1989). *But see* Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 874 (N.D. Ga. 1986).

181. *See In re* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 F.C.C.Rcd. 5849, 5871 n.17 (1988).

182. *See* Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3rd Cir. 1989) (Cable Policy Act does not give CATV systems a right of access to multi-unit dwellings for purpose of providing cable service to tenants). *But see supra* notes 166-174 and accompanying text. *See generally* Meyerson, *supra* note 173, at 610-12.

183. *Accord* Meyerson, *supra* note 173, at 611-12.

spective of whether section 541 guarantees pole access over public or private easements, new equal access regulations should be implemented to ensure a competitive environment if telephone companies are permitted to enter the CATV business.

B. Implementing the Mandatory Pole Access Rules

To ensure that the new pole access rules will be effective in eliminating pole access discrimination, several factors should be considered in defining the scope of these rules. First, the rules should be designed to prevent favoritism to affiliated CATV systems and inhibit monopolization of new broadband services.[184] A rule which requires telephone companies to certify that they presently offer equal pole access for cable related hook-ups to both independent and affiliated CATV systems would accomplish these designs. This certification procedure should be a prerequisite for receiving permission to participate in the CATV business.

Second, the rules should eliminate any potential for the telephone companies to terminate existing pole attachments on the basis of a higher rate offer by an affiliated CATV system.[185] Such a goal could be achieved by obligating telephone companies to offer pole access at identical rates and terms to both affiliated and independent CATV systems.[186]

The rules should also discourage any pole access advantages that telephone companies possess over poles which are owned by other utilities. Telephone companies may possess such advantages because they have pre-existing lease arrangements with power companies for use of the power companies' poles. If the telephone companies were to use the leases to secure access on the power companies' poles, independent CATV operators would be at a distinct competitive disadvantage. By prohibiting affiliated CATV systems from utilizing telephone company access rights to poles owned by other utilities, such advantages would effectively be discouraged.[187]

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184. Because of the relative infancy of the market for broadband services, a rule requiring equal access to pole space for independent CATV operators would prevent telephone companies from rapidly entering and monopolizing this market. *See supra* note 153.

185. Because the Pole Attachment Act does not mandate access, the FCC arguably will possess jurisdiction over a termination of pole access only when the termination constituted an unreasonable practice. *See supra* text accompanying notes 158-60. If the termination is based on higher rate offer by another CATV system, however, the termination may be viewed as a reasonable practice. *See supra* text accompanying notes 161-162.

186. This rule would also minimize the ability of the telephone companies to employ such alleged anticompetitive practices as overcharging for make ready work, requiring large prepayments, and delaying work completion. *See Cross-Ownership Rules*, 3 F.C.C.Rcd. at 5852-53.

187. The FCC has indicated that it may prohibit telephone companies from providing CATV service when equal access to power utility poles is not available. *See Cross-Ownership Rules*, 3 F.C.C.Rcd. at 5860. This solution, however, is unnecessarily restrictive. Although the rule would effectively curb the telephone companies' abil-

Finally, from the Supreme Court's holdings in *Loretto v. Teleprompter*[188] and *Florida Power Co. v. F.C.C.*,[189] it is apparent that rules which require a property owner to dedicate a portion of their property for CATV attachments constitute a taking under the Fifth Amendment for which just compensation is required.[190] Because the new access rules would require telephone companies to provide pole space for independent CATV hook-ups, they could arguably run afoul of the takings proscriptions.[191] Consequently, the equal access rules should include provisions which require that just compensation be paid for any access that telephone companies are required to provide. The just compensation provisions could be developed from the rate determination formula of the Pole Attachment Act[192] as well as the compensation considerations contained in section 633 of the House version of the Cable Policy Act.[193]

V. CONCLUSION

For the past two decades, effective regulation of cable television has produced an environment in which this new communications medium has flourished. But with the goal of nation-wide dissemination of cable television rapidly reaching fruition, much of the anticompetitive behavior which once threatened the viability of an infant CATV industry is no longer present. Accordingly, the FCC has tentatively concluded to relax

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ity to utilize their relationships with power companies for the benefit of their affiliates, it would discourage the very same competition that the FCC seeks to encourage by relaxing the cross-ownership rules. *See supra* notes 151-155 and accompanying text. Conversely, a rule which prohibits an affiliated CATV system from utilizing a telephone company's access rights to poles owned by a power company would eliminate the potential for anticompetitive behavior while preserving competition in the CATV market. Both affiliated and independent CATV systems should compete on an equal basis for power company pole space.

188. 458 U.S. 419 (1982); *see also supra* notes 63-64, 169-171 and accompanying text.

189. 480 U.S. 245 (1987); *see also supra* notes 58-67 and accompanying text.

190. *See supra* note 167.

191. Several theories can be advanced for finding that the equal access rules do not constitute a taking under the Fifth Amendment. It can be argued that because telephone companies have monopolistic control over access to essential resources, antitrust principles require the telephone companies to make the resources available to others on equal terms. *See* General Tel. Co. v. United States, 449 F.2d 846, 860-61 (5th Cir. 1971); *see also* Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States v. Terminal Ry. Assoc., 224 U.S. 383 (1912). Similarly, it can be argued that the equal access rules do not amount to a taking because they are simply a reasonable precondition to entry into the CATV business. *Cf. General Tel. Co.*, 449 F.2d at 860. Because it is uncertain whether either of these theories would be adopted by a court, just compensation provisions should be included to ensure the constitutional validity of the equal access rules.

192. *See supra* notes 47-57 and accompanying text.

193. *See* H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* H.R. Rep. No. 934, 98th Cong., 2d Sess. 13 (1984); *see also supra* notes 167-173, 178-180 and accompanying text.

the telephone company-cable television cross-ownership rules—rules which once partially sheltered the CATV industry from competition.

Indeed, increased competition in the CATV market is likely to encourage the exploration of new communication services as well as increase the responsiveness of CATV providers to the needs of the marketplace. Increased competition from telephone companies, however, raises anew the fear that these companies will utilize their monopolistic control over the means of access for cable distribution to favor an affiliated CATV system. The regulatory framework which presently governs cable television access to pole space is not sufficient to protect independent CATV systems from predatory pole access practices. Therefore, to balance the benefits of injecting competitive efficiencies into the CATV market against the increased potential for anticompetitive pole access behavior, rules should be implemented that require telephone companies to provide equal access to pole space to independent CATV systems as a precondition for entry into the CATV market.

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