ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION; COX COMMUNICATIONS GULF COAST, L.L.C., *et al.*

000000-PU

Complainants,

P.A. No. 00-004

vs.

GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

GULF POWER COMPANY'S MOTION FOR CONFIDENTIAL TREATMENT OF COMMERCIAL AND FINANCIAL INFORMATION

Gulf Power Company ("Gulf Power") files this Motion for Confidential Treatment of Commercial and Financial Information pursuant to Sections 0.459 and 0.457 of the Commission's Rules[1] regarding requests that materials or information submitted to the Commission be withheld from public inspection.[2] Gulf Power respectfully requests the Commission to grant confidential treatment to certain information contained in the documents that Gulf Power has filed under seal for inclusion in the record of the

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[1] 47 C.F.R. §§ 0.459 and 0.457.

[2] In conformity with 47 C.F.R. § 1.1407(a), Gulf Power is contemporaneously filing a Motion for Leave to File Motion for Confidential Treatment of Commercial and Financial Information.

above-referenced proceeding. As grounds therefor, Gulf Power states as follows:

The exhibits to Gulf Power's Answer contain commercial and financial information about Gulf Power's operations and costs, including cost data used to calculate Gulf Power's annual carrying charges and investment costs. This information about Gulf Power's operating options, costs and practices is competitively sensitive, proprietary information as defined in Sections 0.459 and 0.457 of the Commission's Rules and in the Freedom of Information Act's ("FOIA") fourth exemption providing for nondisclosure of "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). As such, it must be exempt from disclosure to anyone other than the Commission staff.

Most of the confidential information is contained in Gulf Power's FERC Form No. 1 for the year ending December 31, 1999. Gulf Power has asserted confidential treatment for it in that setting as well, and it is not currently available to the public.[3] Public disclosure in this proceeding would compromise the confidential status the cost information is currently afforded. In addition, some of the confidential information supporting the replacement cost methodologies being submitted by Gulf Power is from its internal documents pertaining to

[3]For a more detailed explanation of Gulf Power's grounds for asserting confidential treatment, see Gulf Power's April 28, 2000 Letter to The Honorable David P. Boergers Secretary of the Federal Energy Regulatory Commission Requesting Confidential Treatment of FERC Form No. 1 attached to this Motion for Confidential Treatment, as Attachment A to the Declaration of Ronnie R. Labrato. Gulf Power has also requested confidential treatment of this information from the Florida Public Service Commission ("FPSC"), see Attachment B to Declaration of Ronnie R. Labrato.

an economic depreciation study of its assets, an incremental cost of capital, and subaccounts that make up the FERC Form No. 1 accounts.

The confidential information is being submitted pursuant to the complainants' request and Section 1.1404(j) of the Commission's rules in the above-styled proceeding before the Commission. 47 C.F.R. § 0.459(b)(2).

The proprietary information and materials contained in certain exhibits to Gulf Power's Answer provide commercial and financial data pertaining to Gulf Power's sales, purchases and transmission of electricity and detailed, internal, commercially sensitive information about the Company's operations and costs—information which Gulf Power would not voluntarily share with competitors, suppliers and key customers. 47 C.F.R. § 0.459(b)(3). Allowing public disclosure of all of this information would provide Gulf Power's competitors with an "open book" on many of its sources of business and revenues, its capital expenditures, and its variable costs, which to a large extent, drive power sales and purchases in a competitive marketplace. Thus, information about Gulf Power's operating options, costs and practices is extremely sensitive and should be afforded confidential status to avoid the anticompetitive behavior that could result from its disclosure.

Moreover, some of the information contained in these exhibits could be commercially sensitive not only for Gulf Power, but also for its customers. Competitors and suppliers would have an inappropriate advantage if they were able to structure and price their services on the basis of Gulf Power's or some other similarly situated company's transactions, costs, and operations, rather than on the basis of their own costs. (*See* Gulf Power's Letter to FERC, Attachment A to Declaration of Ronnie R. Labrato).

The confidential information and materials concern a service that is subject to competition because in the wake of deregulation of the electric utility industry most of Gulf Power's competitors are non-traditional utilities that are not required to publically disclose information similar to that requested by the plaintiffs. 47 C.F.R. § 0.459(b)(4). Gulf Power currently faces aggressive competition from power marketers, independent power producers, cooperative electric suppliers, and other utilities outside the state. Furthermore, in this rapidly changing, deregulated industry, Gulf Power faces great uncertainty as to who its actual competitors are and will become. This uncertainty makes the company's cost data even more sensitive.

Disclosure of the confidential information and materials to anyone other than the Commission staff would result in substantial competitive harm within the meaning of 47 C.F.R. § 0.459(b)(5), because it would force Gulf Power to operate in an environment in which its competitors would have detailed commercial and financial information about it, but it would not have the same commercial and financial information about most of its competitors. The disparity in information would make it virtually impossible for Gulf Power to compete as effectively as other market participants. Furthermore, competitors would be able to use Gulf Power's privileged cost and operations information to engage in anticompetitive conduct.

Gulf Power has taken every possible measure to prevent unauthorized disclosure of the attached information and materials, including asserting its confidential and privileged status in every judicial proceeding, mandatory filing, and regulatory proceeding in which it has been faced with a request for this information. 47 C.F.R. § 0.459(b)(6); (*See, e.g.*, Gulf Power's Letter to FERC, Attachment A; Gulf Power Company's Letter to the FPSC, Attachment B).

The information and materials in the exhibits to Gulf Power's Answer are not currently available to the public. 47 C.F.R. § 0.459(b)(7). Some of the attached data is contained in Gulf Power's FERC Form No. 1 for the year ending December 31, 1999, and Gulf Power has requested confidential treatment for the information from FERC and the FPSC. Gulf Power's current request for confidential treatment of this information has not been denied by FERC or the FPSC and is currently afforded privileged, confidential treatment by FERC and the FPSC. Public disclosure in this proceeding before the Commission would jeopardize and compromise Gulf Power's critical need to protect this information from disclosure in the public realm. Furthermore, principles of comity counsel against inconsistent determinations in agency proceedings. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962).

Because the information Gulf Power seeks to withhold from public disclosure is currently afforded confidential status, the Commission should grant Gulf Power's request in this proceeding.

The competitively sensitive information and materials contained in the exhibits to Gulf Power's Answer should retain their confidential status indefinitely because they are currently not subject to public disclosure and because public disclosure would harm Gulf Power's business and operations. 47 C.F.R. § 0.459(b)(8).

Gulf Power has repeatedly sought confidential treatment of this information from FERC. 47 C.F.R. § 0.459(b)(9); (*see, e.g.*, Gulf Power's Letter to FERC, Attachment A). In asserting its right to confidential treatment of this information, Gulf Power has consistently explained that because of the increasingly competitive electricity market, the availability of this cost information would provide other market participants with a competitive advantage over Gulf Power. The public availability of information about Gulf Power's costs and operations would allow competing power suppliers to develop marketing strategies that target Gulf Power's existing and potential power sales customers. However, Gulf Power would not have a similar advantage in being able to access its competitors' cost information. Such a result would damage the competitive market and cause Gulf Power to suffer a severe competitive detriment.

The information for which Gulf Power seeks confidential status meets the requirements of FOIA's fourth exclusion to public disclosure of information filed with federal agencies. As explained above, it is "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Federal case law reveals that the Commission properly grants confidential status to sensitive financial information required by the government when disclosure of the information "is likely to cause substantial harm to the competitive position of the person from whom information was obtained." *Allnet Communication Services, Inc. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992) (*citing and following National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)); *see also Critical Mass Energy Project v. NRC*, 973 F.2d 871, (D.C. Cir. 1992). According to *Allnet*, upon a challenge to nondisclosure, the party seeking proprietary treatment must present evidence of "actual competition and a likelihood of substantial competitive injury." 800 F. Supp. at 988.[4] The district court in *Allnet* held that the Commission correctly granted proprietary status to a system that enabled anyone with access to the information to estimate the company's future costs of providing services. *Id.* at 990. Likewise, Gulf Power has demonstrated above that it faces actual competition and stands to suffer a substantial competitive injury upon disclosure of the confidential information.

Public access to the information and materials for which Gulf Power seeks confidential treatment is unnecessary. In addition, the public in this proceeding do not have a need for the confidential information. In its Answer, Gulf Power is providing the plaintiffs

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[4]The Commission also applies this test and has explained that the entity seeking confidential treatment need not present "an elaborate economic analysis . . . to establish the likelihood of substantial competitive injury." *Marcus Cable Associates, v. Texas Utilities Co.* 12 FCC Rcd. 10,362 (July 21, 1997). In *Marcus Cable*, a pole attachment case, the Commission granted confidential status to portions of sales agreements the plaintiff had entered into with third-party overlashers. The Commission held that sections of these agreements contained competitively sensitive data and that "substantial competitive injury [was] likely to result from disclosure."

with a "Public Copy" of the exhibits containing the confidential information that fully informs Complainants of how Gulf Power calculates its pole rental fee and precisely explains how it arrives at just compensation. Even though the "Public Copy" redacts the confidential cost information, the documentation provided is adequate to meet any possible requirements the Commission may impose on Gulf Power to provide information regarding how it arrived at the price charged for the taking the plaintiffs demand of Gulf Power.

Gulf Power has already provided Complainants with the opportunity to review the confidential materials and information they requested, conditioned only upon their execution of a confidentiality agreement. However, the Complainants ignored Gulf Power's offer, choosing neither to request access to the information on confidential terms nor to request production on any other terms.

Gulf Power is aware that the Commission will generally approve of protective agreements governing the discovery of materials in formal complaint proceedings. For example, in *RCN Telecom Services v. Bell Atlantic-Delaware, Inc.*, the parties filed motions pursuant to 47 C.F.R. §§ 0.459 and 1.727(a) requesting the Commission enter an order accepting their protective agreements. 13 FCC Rcd. 20,315 (Oct. 14, 1998).[5] If, after reviewing the "Public Copy" of the exhibits to Gulf Power's Answer, the Complainants

[5]The Commission's acknowledgment that many situations merit confidential treatment is implicit in its decision to adopt a Model Protective Order (MPO) that it has declared may be used in situations such as this. *See Report and Order, In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24,816, Appendix C (Aug. 4, 1998).

desire access to the confidential cost information, Gulf Power is willing to provide this information upon Complainants' execution of an appropriate confidentiality agreement.

Gulf Power asserts that granting its Motion for Confidential Treatment will serve the public interest by allowing full development of the record in the above-referenced proceedings while protecting the proprietary nature of Gulf Power's competitively sensitive commercial and financial information.

WHEREFORE, Gulf Power respectfully requests the Commission to enter an order granting its Motion for Confidential Treatment of Commercial and Financial Information.

Respectfully submitted,

Raymond A. Kowalski

RAYMOND A. KOWALSKI
KELLER AND HECKMAN LLP
Suite 500 West
1001 G Street, N.W.
Washington, D.C. 20001
Telephone: (202) 434-4100
Telefax: (202) 434-4646

RALPH A. PETERSON
RUSSELL A. BADDERS
BEGGS & LANE LLP
Sixth Floor, Blount Building
3 West Garden Street (32501)
Post Office Box 12950
Pensacola, Florida 32576-2950
Telephone: (850) 432-24
Telefax: (850) 469-3330

J. RUSSELL CAMPBELL
ANDREW W. TUNNELL
JENNIFER M. BUETTNER
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203
Telephone: (205) 251-8100
Telefax: (205) 226-8798

Attorneys for Respondent GULF POWER COMPANY

DATED: August 9, 2000

CERTIFICATE OF SERVICE

I, Cassandra Hall, a secretary in the law firm of Keller and Heckman LLP, certify that I have served a copy of this "Gulf Power Company's Motion for Confidential Treatment of Commercial and Financial Information," upon the following on this the 9th day of August, 2000:

Michael A. Gross (by express delivery)
Vice President
Regulatory Affairs and Regulatory Counsel
FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.
310 North Monroe Street
Tallahassee, Florida 32301

Paul Glist (by courier)
John Davidson Thomas
Brian M. Josef
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Deborah Lathen (by hand delivery)
Chief, Cable Services Bureau
FEDERAL COMMUNICATIONS COMMISSION
Room 3C740
445 12th Street, S.W.
Washington, D.C. 20554

Blanca S. Bayo, Director (by U.S. mail)
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Cheryl King (by hand delivery)
Staff Attorney
FEDERAL COMMUNICATIONS COMMISSION
Room 4C738
445 12th Street, S.W.
Washington, D.C. 20554

Kathleen Costello (by hand delivery)
Acting Division Chief
Financial Analysis & Compliance
Cable Services Bureau
FEDERAL COMMUNICATIONS COMMISSION
Room 4C830
445 12th Street, S.W.
Washington, D.C. 20554

Cassandra Hall

Before The

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION; COX COMMUNICATIONS GULF COAST, L.L.C., *et al.*

Complainants, **P.A. No. 00-004**

vs.

GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

DECLARATION OF RONNIE R. LABRATO

I, Ronnie R. Labrato, having personal knowledge of the following, make this declaration pursuant to Sections 1.16 and 1.1407 of the Commission's rules. 47 C.F.R. §§ 1.16, 1.1407.

1. I am Chief Financial Officer and Comptroller for Gulf Power Company.

2. I have read the Motion for Confidential Treatment of Commercial and Financial Information in the above-captioned matter and declare that the facts recited therein are true and correct to the best of my knowledge, information, and belief.

3. I hereby verify that I am familiar with the documents attached as Attachments A and B to the Motion for Confidential Treatment of Commercial and Financial Information; that they are true and correct copies of documents made and kept in the regular course and business of Gulf Power Company either by me or under my direction and supervision; and that they are true and correct copies of the documents for

the purpose that they were submitted.

Declarant says nothing further.

I declare under penalty of perjury that the forgoing is true and correct. Executed on this 8th day of August, 2000.

Ronnie R. Labrato
Chief Financial Officer and Comptroller
Gulf Power Company

Attachment A
Declaration of Ronnie R. Labrato

.̄ne Energy Place
Pensacola Florida 32520

850.444.611

GULF POWER
A SOUTHERN COMPANY

June 19, 2000

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Dear Secretary Boergers:

Enclosed is a revised letter regarding Gulf Power Company's FERC Form I filing for the year December 31, 1999. In the original letter dated April 28, 2000, the Company requested that "certain commercial and financial information contained in its filing be treated as "privileged" and "confidential" to the fullest extent permitted by law, and the rules and regulations of the Commission". This request for privileged treatment has been modified to include Page 403.

Sincerely,

Ronnie Labrato

Ronnie R. Labrato
Controller

RRL/lj

cc/enc: Federal Energy Regulatory Commision
Brian Holmes

bc/enc: Arthur Andersen, LLP
Susan Bell

Southern Company Services
W. D. Hudson

Gulf Power Company
T. J. Bowden
R. G. Moore
A. E. Scarbrough
W. E. Tate
R. J. McMillan
S. D. Ritenour

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One Energy Place
Pensacola Florida 32520
850.444.6111

June 19, 2000

GULF POWER
A SOUTHERN COMPANY

REVISED

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Re: *Request Pursuant to 5 U.S.C. § 552 (1999) and 18 C.F.R. § 388.112 (1999) for Confidential Treatment of Certain Commercial and Financial Information Contained in 2000 Federal Energy Regulatory Commission Form 1*

Dear Secretary Boergers:

Enclosed for filing with the Federal Energy Regulatory Commission ("FERC" or "Commission") is Gulf Power Company's (the "Company") FERC Form 1 for the year ending December 31, 1999. We also have submitted for filing an electronic version of the Company's FERC Form 1, which has been tendered under the Commission's protocol for such filings. With regard to both the hard-copy and electronic submission, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4) (1999) and 18 C.F.R. § 388.112 (1999), the Company requests that certain commercial and financial information contained in its filings be treated as "privileged" and "confidential" to the fullest extent permitted by law, and the rules and regulations of the Commission.

In accordance with the Commission's Form 1 filing instructions, the original and one copy of the Form 1 have been boldly marked with the following indication: "Contains Privileged Information –Do Not Release" and identifies within the document the information for which confidential treatment is sought. In accordance with the Commission rules addressing requests for privileged treament of documents, 18 C.F.R. § 388.112(b), we also have enclosed fourteen (14) copies of the Company's Form 1 that boldly indicates that confidential information has been removed for privileged treatment, and which does not include the privileged information.

SUMMARY AND REQUEST FOR PRIVILEGED TREATMENT

The Company's Form 1 filing contains nearly 450 pages of information relating to the Company's operation as a public utility. Of those 450 pages, the Company has requested that fewer than forty pages of each Form 1 be given confidential treatment. The Privileged Information for which protection is sought includes, among other things, detailed information regarding the Company's generation plant costs, power purchases, retail and wholesale sales, and environmental expenses. Without confidential treatment the Company's most sensitive commercial and financial information will be made readily available to their competitors and to the wholesale market in general to the detriment of the Company and the market.

Specifically, the Company requests confidential treatment for the privileged commercial and financial information contained in the following pages of the Form 1:

Pages 204-207	Electric Plant in Service
Page 214	Electric Plant Held for Future Use
Page 216	Construction Work in Progress-Electric
Page 219	Accumulation Provision of Depreciation of Electric Utility Plant
Pages 228-229	Emission Allowance Inventory and Cost
Pages 300-301	Sales for Resale—Revenues and MWH
Page 304	Sales of Electricity by Rate Schedules
Pages 310-311	Sales for Resale
Pages 320-323	Electric Operation and Maintenance Expenses
Pages 326-327	Purchased Power
Pages 328-330	Transmission of Electricity for Others
Pages 336-337	Depreciation and Amortization of Electric Plant
Page 401	Electric Energy Account and Monthly Peaks and Output
Page 402-403	Electric Plant Statistical Data
Page 430	Environmental Protection Facilities
Page 431	Environmental Protection Expenses

The information for which confidential treatment is sought falls into two (2) basic categories and the release of such information will cause substantial harm to the competitive position of the Company.[1] The first category can best be described as the Company's "sales/price" information. The pages relating to "sales/price" include pages 300-301, Sales for Resale-Revenues and MWH, page 304, Sales of Electricity by Rate Schedule; pages 310-311, Sales for Resale; pages 328-330, Transmission of Electricity for Others; and page 401, Electric Energy Account and Monthly Peaks and Output. These pages provide information about the Company's sales, purchases and transmission of electricity, as well as information about specific customers and transactions. This information provides the Company's competitors with an "open book" on many of the Company's sources of business and revenues. Moreover, some of the information contained in these sections could be commercially sensitive not only for the Company but also for its customers. The Company's competitors and suppliers have an inappropriate advantage if they are able to structure and price their services on the basis of the Company's or some other similarly situated company's transactions, costs, and operations, rather than on the basis of their own costs and abilities.

The second category can best be described broadly as the Company's "cost" information.[2] The pages falling into this "cost" category contain highly detailed, internal, commercially sensitive information about the Company's operations and costs—information which the Company would not voluntarily share with competitors, suppliers and key customers. The information in this "cost" category includes data on the Company's capital expenditures, but it also includes information on the Company's variable costs, which to a large extent, drive power sales and purchases in a competitive marketplace. Thus information about the Company's operating options, costs and practices is extremely sensitive.

JUSTIFICATION – THE CHANGING COMPETITIVE LANDSCAPE

In competitive markets the asymmetrical availability of information about competitors can provide market participants a competitive advantage. This is increasingly true for the electricity market. The Company, like other public utilities, is facing competition

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[1] *See e.g., Mobile Bay Pipeline Projects, 49 FERC ¶ 61,066 at ¶ 61,022 (1989).*

[2] Form 1 pages 204-207, Electric Plant in Service; 214, Electric Plant Held for Future Use; 216, Construction Work in Progress-Electric; 219, Accumulated Provision for Depreciation of Electric Utility Plant; 228-229, 320-323, Electric Operation and Maintenance Expenses; 326-327, Purchased Power; 336-337, Depreciation and Authorization of electric Plant; 402-403, Electric Plant Statistical Data; 430, Environmental Protection Facilities; and 431 Environmental Protection Expenses; all contain information relative to the Company's "costs."

from wholesale power marketers and other non-traditional utilities. Consequently, the commercial sensitivity of information about the Company has increased in recent years. The public availability of information about the Company's costs and operations gives competing power suppliers a significant advantage in developing marketing strategies that target the Company's existing and potential power sales customers.

The public availability of information about the Company's costs and operations would be less objectionable if all market participants were subject to the same reporting and disclosure requirements. However, most of the Company's competitors are non-traditional utilities (but many are as large or larger than the Company) that are not subject to the detailed reporting requirements that apply to the Company and other public utilities. Consequently, the Company is operating in an environment in which its competitors have detailed commercial and financial information about it, but it has little or no such information about most of its competitors. The disparity in information makes it virtually impossible for the Company to compete as effectively as other market participants.

Given the many changes in electricity markets over the last few years, the Company respectfully requests: (1) that the Commission reconsider its prior decision regarding Form 1 confidentiality; (2) that it recognize the competitive harm which will result from disclosure of the Company's Privileged Information; (3) that it carefully balance Company's need for confidentiality with the Commission's need for public disclosure of Form 1 information; and (4) that it determine that this type of information may be filed confidentially subject to the FOIA and 18 CFR § 388.112. In the alternative, the Company urges the Commission to convene a technical conference or other appropriate proceeding to more fully explore these confidentiality claims made by the Company (and, likely, by other filing public utilities) and to adopt appropriate protective measures during the interim.

DISCUSSION

The Commission Should Reconsider Its Holding in *Consolidated Edison* Regarding Confidential Treatment of Form 1 Information.

In denying requests for confidential treatment of privileged information contained in Form 1 in prior years (including its 1998 reauthorization), the Commission has relied upon *Consolidated Edison Company*.[3] In *Consolidated Edison*, the Commission denied a request for confidential treatment of portions of Form 1 information. In that order, the Commission reasoned that "[t]he information is necessary for the Commission to carry out its jurisdictional responsibilities and is used, among other things, to evaluate the reasonableness

[3] *Consolidated Edison Company of New York, Inc., et al.*; 72 FERC ¶ 61,184 (1995).

of rates subject to the Commission's jurisdiction and the operation of power markets."[4] While the Company recognizes the Commission's need for much of the information reported in Form 1, the Company submits that protecting a small subset of that information from public disclosure, will not materially undermine or jeopardize the Commission's ability to carry out its jurisdictional responsibilities. The data will continue to be fully available to the Commission for evaluating each Company and/or for aggregating information about the industry as a whole.

The Commission recognized in the 1995 *Consolidated Edison* order that the market situation was changing and that the Commission's policy on confidentiality of this type information would also have to change. In recognition of that fact, the Commission stated:

> As the industry becomes increasingly competitive, the Commission will monitor its various existing reporting requirements to make sure that they are needed, fair to all segments of the industry, and consistent with the workings of a competitive environment.[5]

At the time the Commission rendered its decision, neither Consolidated Edison nor Central Hudson Gas & Electric Co. had qualified for market-based wholesale rate authority.[6] The decision denying confidential treatment noted that the "cost data that Con Edison and Central Hudson seek to keep confidential are particularly relevant in evaluating cost-based rates such as those petitioners continue to employ." 72 FERC ¶ 61,184 at ¶ 61,891. Since that time, the Commission has confirmed market-based rate authority for many utilities based upon the absence of generation-based market power, the absence of transmission market power, the absence of other barriers to entry, and the absence of a risk of affiliate abuse. As noted above, the Commission has extended such market-based rate authority to the Company. Illustrative of the trend in the past five years is the fact that the Commission has recently extended market-based rate authority to most of the jurisdictional utilities throughout the Southeast. The Commission has extended market based rate authority to every public utility operating company in states contiguous to the Company. Thus the Company now competes with the municipal and cooperative utility systems within their control area, with power marketers with market rate authority, with independent power producers and Exempt Wholesale Generators, and with other public utilities which increasingly have qualified for market rate authority.

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4 *Id.* at ¶ 61,891.

5 *Consolidated Edison*, 72 FERC at ¶ 61,891.

6 In 1997, the Commission accepted market-based rate filings by Consolidated Edison and Central Hudson in Docket Nos. ER97-707 and ER97-2872. Consolidated Edison has requested suspension of market rate authority in Docket ER99-2251 in order to implement cost of service based rates as part of market power mitigation measures associated with its merger with Orange & Rockland Utilities.

The dramatic shift to reliance on markets to set wholesale power prices has two significant implications: First, the reliance on cost of service regulation for power sales (as opposed to transmission service) has become the exception and not the rule; and second, increased reliance on competitive processes indicates that the Commission should encourage those processes through minimizing opportunities for erstwhile competitors to engage in anything other than fair competition.

The changes envisioned by the Commission at the time it issued the *Consolidated Edison* decision have occurred, and it is respectfully submitted that the Commission should now carefully review its reporting requirements and its decision in *Consolidated Edison* in light of current market conditions and grant the Company's request for confidential treatment of the Privileged Information. A careful review of the Form 1 reporting requirements demonstrates that the public in general, and competitors in particular, do not have a justifiable need for the Company's Privileged Information. Moreover, these reporting requirements do not apply equally to all market participants and are not consistent with the workings of the existing competitive electric environment.

The Public Has No Justifiable Need for the Privileged Information

Even if the disclosure of the Privileged Information to the public may have been justified in the past to ensure that regulated rates were just, reasonable, and not unduly discriminatory or preferential, those justifications simply do not exist today in the competitive wholesale market. Rates and charges for electric energy and capacity at both the retail and wholesale level have never been more accessible. Market prices for electricity are readily available for every region of the country through various credible and independent sources. Instead of protecting the public from the types of potential market abuses, the release of certain Form 1 information now has the effect of causing commercial harm to the Company and other Company who must currently provide such information on a non-confidential basis. Public disclosure of filing utilities' sensitive cost and revenue data for only a part of the industry are no longer fundamental to the Commission's execution of its jurisdictional responsibilities.

However, to the extent the Company still has cost-based rates on file, the justness and reasonableness of those costs are addressed in specific proceedings initiated every year just for that purpose. The Commission already receives an annual "informational filing" from the Company providing cost information justifying its cost-based rates that are on file at the Commission. These informational filings are made by November 1 each year, are made available to the public, and trigger procedures that enable the Commission, Staff and all affected customers to review the costs relevant to the Company's cost-based rates and to raise objections, if they have any. Indeed, the informational filing tendered by the Company (though its service affiliate) for calendar 1999 triggered a number of customer protests and a Staff request for hearing, prompting a Commission order setting a number of rate issues for hearing, which ultimately resulted in a rate settlement. *See Southern Company Services, Inc.*, 86 FERC ¶ 61,057 (1999).

In addition, if the Company makes a cost-based rate filing that requires Commission review of the Form 1 data, the Commission Staff will have easy access to that information since the Company is filing an unexpurgated version of the Form 1 in compliance with Commission regulations. Customers that demonstrate a need to review the confidential portions of the Form 1, either in conjunction with matters the Commission has set for hearing or in the course of evaluating whether to make a filing under Section 206 of the Federal Power Act concerning the reasonableness of the Company's filed rates, can obtain that information if they sign the model confidentiality agreement that the Commission adopted in 1998. Consequently, granting the Company's request for confidential treatment will not adversely affect the ability of the Commission to fulfill its regulatory obligations or the ability of the Company's customers to obtain the information they need to protect their interests.

It is important to note that the Company is not here proposing to discontinue collecting or reporting Form 1 data or even that such information would be unavailable to persons served under cost-based rates, to FERC, or to other government regulatory agencies, state or federal. The Company is instead requesting that the Commission reexamine its public treatment of certain categories of that data and undertake to maximize the effectiveness of markets by extending confidential treatment to certain categories of Form 1 data. The Commission could condition confidential treatment so that the data would be available to those with a need for the data, in addition to other state and federal regulatory agencies. For example, the Financial Statistics of Selected Electric Utilities published by the Energy Information Administration, referenced at page one of Form 1 as the reason for the non-public character of the filing and secondary purpose of the filing, is at an aggregate level that has no major competitive significance. The Energy Information Agency could have access to this data for this purpose without compromising its generally applicable confidential character. In addition to the Commission, state commissions could have access while still affording confidential treatment to certain categories of information in the filing with the Commission.

This proposed selective confidentiality is consistent with the purpose of confidential treatment under the Freedom of Information Act of avoiding commercial disadvantage to an entity required to file a report and is consistent with encouraging competitive wholesale power markets. The letter orders reference the use of Form 1 data by the Commission to assess the performance of wholesale power markets and to detect abuses of market power. The information will continue to be available to the Commission for any and all such purposes. The data identified by the Company has limited or no pertinence to issues of abuses of market power but can be made available as needed when pertinent to such an issue. As a result of market-based pricing and increased reliance on competitive processes to establish just and reasonable prices, the balance has shifted from the circumstances of the *Consolidated Edison* decision to one favoring more limited disclosure of pricing and production cost information.

Wholesale Disclosure is Unfair and Anticompetitive

The Company faces increasingly vigorous competition in the generation and sale of electricity at wholesale. With access to the Company's commercially sensitive information, such as the Privileged Information, competitors gain an advantage since many competitors are not similarly subject to the Form 1 reporting requirements. For example, competitors can calculate the variable operating and maintenance cost for each of the Company's generating units from the Form 1 information. If, based upon information in the public domain, those competitors are able to ascertain the Company's marginal costs of producing electricity, they will use that information in setting their own prices whether or not those prices reflect the competitors' marginal costs.

A truly competitive marketplace should spur all participants to press for the most efficient operations and lowest costs possible, rather than merely matching another's known internal practices and costs. The Supreme Court of the United States has recognized that, as a general proposition, the exchange of price information threatens the efficient operation of markets, and are often anticompetitive.[7] This interdependent pricing, or "conscious parallelism" by firms in a market is generally accepted as having a chilling effect on competitive pricing. Publicizing transaction prices and generation costs, even recent historical prices and costs, will chill price competition.[8] By rejecting the Company's requests for confidential treatment of the Privileged Information, the Commission promotes artificial disparities among competitors, which are not consistent with the workings of a competitive electric market.

The FOIA and the Commission's Regulations Clearly Provide for Confidential Treatment of the Company's Privileged Information.

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[7] *See, e.g., United States v. Container Corp. of America*, 393 U.S. 333 (1969)

[8] *See, The Timken Co. v. U. S. Customs Service*, 491 F.Supp. 557 (D.D.C. 1968).

The Commission has both the authority and the responsibility to manage sensitive commercial and financial information as confidential under the FOIA and the Commission's related confidentiality regulations at 18 C.F.R. § 388.107, 388.112. In fact, the Commission's regulations expressly provide for the protection of privileged and confidential commercial and financial information such as the Privileged Information.[9] The portions of Form 1 for which the Company seeks confidential treatment contain highly sensitive commercial and financial information[10] and clearly fall within disclosure exemptions of both the FOIA and the Commission's regulations.[11] As this Commission has recognized:

> [C]ommercial or financial matter is "confidential" for the purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[12]

The Privileged Information clearly contains sensitive commercial and financial information. This type of information should be exempted from the public disclosure. The information is directly relevant to the ability of the Company to compete in the wholesale marketplace for power sales. If wholesale customers know the details of the Company's costs, they will be able to develop offers to purchase power from the Company that minimize the Company's ability to obtain a contribution to its fixed costs. Competitors in the wholesale power sales market will be able to develop competing offers that undercut the Company's offers because they will have superior market information.

Such unfair competition will adversely affect the public interest because it will allow competitors to raise their prices to just below the Company's cost-based prices, which would

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9 18 C.F.R. § 388.107 (1999) (emphasis added). *See* 5 U.S.C. § 552(b)(4) (1999), which includes identical language.

10 *Central Maine Power Co.*, 72 FERC ¶ 61,118, at ¶ 61,180 (1995) ("Commercial or financial information has been held to include such items as profit and loss data, overhead and operating costs, and information on financial condition.") (citing *Landfair v. United States Dep't of the Army*, 645 F. Supp. 325, 327 (D.D.C. 1978)).

11 *See supra* note 12 and accompanying text.

12 *Central Maine Power Co.*, 72 FERC ¶ 61,118, at ¶ 61,679 (1995) (emphasis added) (quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

increase the prices that power purchasers must pay. The impact of release of confidential utility information on the cost of purchased power has been recently recognized by the Nuclear Regulatory Commission ("NRC") in its decision to limit the publication of information provided to it by regulated nuclear plant operators. See NRC Notice No. 99-262. The Company urges the Commission to consider the NRC's action and to provide similar protection against unnecessary publication of confidential information that serves little purpose other than to drive up prices for the customers of regulated public utilities.

Similarly, required information disclsure regarding construction work in progress, has been interpreted by the Commission's Office of Chief Accountant ("OCA") as requiring detailed break down of project specific costs, by plant and date. As described by the Commission's Chief Accountant in Docket No. FA00-22-000:

> The appropriate level of detail should include a description of the nature and/or purpose of the work as well as the location and cost of each project. For example, for a generation project, the project description reported in column (a) should include the nature and/or purpose of the work as well as the plant name and cost of the project.

This is very detailed information and is not sufficiently aggregated so as to limit the value of the information to competitors or to mitigate the harmful competitive impacts of publication. This sort of information can be used by vendors and by competitors in a number of ways that are harmful to the Company. If a vendor or competitor can deduce the cost to the Company to purchase a new economizer as part of a routine maintenance projects at a coal-fired boiler, then there are several harmful results. For example, vendors would be loath to give any unique or special price concessions to the Company for fear that the terms of the deal will become public, which will serve to deter them from offering discounts to the Company.

However, the same vendor could give price discounts to a developer of merchant power plants or an independent power producer without fear of public dissemination of the terms of the transaction. Accordingly, the result of the required disclosures in Form 1 would be (and has been) that the Company pays more for components and equipment that would otherwise be the case. This situation places the Company in the position of "least favored nation" status with regard to its ability to negotiate with its vendors, which works to the detriment of the Company's customers. Any deal reached with the Company becomes a floor for a vendor's negotiations with others. The Commission is urged to heed these concerns and to craft a policy that will narrowly tailor disclosures to the extent absolutely necessary to properly administer the Federal Power Act.

The FOIA and the Commission's Regulations Balance the Need for Confidentiality Against the Need for Public Disclosure.

The FOIA and the Commission's regulations offer a workable procedure for the handling of requests for confidential treatment. The Commission retains the discretion under the Commission's regulations implementing the FOIA to determine whether to honor a request for confidential treatment.[13] In weighing the Company's need for confidentiality against the need for public disclosure, the Commission is urged to consider whether disclosure of the Privileged Information could cause competitive harm to the Company, and whether any such harm is substantial enough to override the purpose of the Form 1 filing requirements.[14] The release of the Privileged Information "will result in substantial competitive harm if it 'would allow competitors to estimate, and undercut, [any Company's] bids.' "[15] As demonstrated above, the Privileged Information contains detailed information regarding each Company's generation plant costs, power purchases, retail and wholesale sales, and environmental expenses. The Company submit that this information would allow competitors to estimate and undercut the Company's costs and is, therefore, entitled to protection.

Since that disclosure of the Privileged Information will result in substantial competitive harm, the Commission should determine whether the harm is substantial enough to override the purposes of making the Form 1 public. In making that determination, it should be noted that the requirement to publish Form 1 information flows from the FOIA,[16] not the Federal Power Act.[17] The Commission's regulations implementing the FOIA provide procedures by which the Commission can make a determination on public disclosure on a case by case basis without the need for a blanket rule that requires the disclosure of all information. Moreover, the regulations do not require that the Commission's determination be made at a specific time.[18] By following the procedures discussed below and as provided

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[13] 18 C.F.R. § 388.112(c)(i) (1999).

[14] *Amoco Prod. Co. & Amoco Energy Trading Co. v. Natural Gas Pipeline Co.*, 82 FERC ¶ 61,037, at ¶ 61,150 (1998) (citing *National Parks &Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) and *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d. 1109, 1115 (9th Cir. 1994)).

[15] *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994) (quoting *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

[16] 16 U.S.C. § 552 (1999).

[17] *See* 16 U.S.C. § 797(d) (1999) (authorizing the Commission to make information public).

[18] *See Mobile Bay Pipeline Projects*, 49 FERC ¶ 61,006, at ¶ 61,022 (1989).

in 18 C.F.R. § 388.112 (1999), the Commission can protect the Privileged Information from public disclosure, without jeopardizing its ability to perform its jurisdictional activities--the overriding purpose of the Form 1.

Once a filing is made seeking confidential treatment of this type of data, the Commission can make an initial determination as to the pages for which confidential treatment is requested and whether a basis exists for the privilege request under the FOIA or Commission regulations.[19] If no basis exists for the claim of privilege, the Commission should release the information.[20] If a basis exists for the claim of privilege, the Commission should treat the information as confidential pending a request for disclosure under the FOIA. Once a FOIA request is made, the Commission should provide notice to the filing party and allow all the interested parties to participate and comment with respect to the request.

In addition, the Commission's (and the public's) interest in this information can be protected without permitting unfettered and open access to such sensitive information. Any party that has a legitimate interest (as determined by the Commission) and who wishes to review confidential Form 1 information can simply become a party to an ongoing rate-making docket involving the utility of interest, or can file a complaint and institute proceedings. Once a formal proceeding is instituted, the party would be free review the information, but only on the condition that the information remain confidential and be used only for adjudicatory purposes. Moreover, under most cost-based power sale agreements, the buyer reserves audit rights which give it rights to review the fuel cost component of charges. Therefore, those with a direct stake already have access to cost data, subject of course to confidentiality provisions of the applicable contracts.

CONCLUSION

As competition increases in electricity markets, so too does the sensitivity of the commercial and financial information the Company is required to provide in FERC Form 1. Based upon both the FOIA and this Commission's rules and regulations, such information is entitled to confidential treatment. In the event a request for the privileged information is made under the FOIA, the Commission's regulations provide adequate

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[19] *See* 5 U.S.C. § 552 (1999); 18 C.F.R. § 388.107 (1999).

[20] 18 C.F.R. § 388.112(c)-(e) (1999).

procedures for determining whether and to what extent such disclosure should be made, including opportunities for comment by the requestor and the party seeking to maintain the confidentiality of the information.

Sincerely,

Ronnie Labrato

Ronnie R. Labrato
Controller

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Gulf Power Company FERC Form 1 for the year ending December 31, 1999)	Docket No.: Date: April 28, 2000

REQUEST FOR CONFIDENTIAL CLASSIFICATION

GULF POWER COMPANY ["Gulf Power", "Gulf", or the "Company"], by and through its undersigned attorney and pursuant to Rule 25-22.006, Florida Administrative Code, hereby files a request that the Florida Public Service Commission enter an order protecting from public disclosure Gulf Power Company's FERC Form 1, for the year ending December 31, 1999, submitted to the Florida Public Service Commission pursuant to Rule 25-6.135 Florida Administrative Code. As grounds for this request, Gulf Power Company states:

Notices and communications with respect to this petition and docket should be addressed to:

Jeffrey A. Stone
Russell A. Badders
Beggs & Lane
P. O. Box 12950
Pensacola, FL 32576-2950

1. Gulf is required by Rule 25-6.135 Florida Administrative Code to submit to the Florida Public Service Commission Gulf Power Company's FERC Form 1 ("FERC Form 1") for the year ending December 31, 1999.

2. Gulf Power asserts that certain information contained in FERC Form 1 is entitled to confidential classification pursuant to §366.093(3)(e), Florida Statutes, as information, the public

disclosure of which would cause irreparable harm to the competitive interests of Gulf Power. This proprietary and commercially sensitive information is not otherwise publicly available.

3. The public disclosure of the information filed subject to this request would cause irreparable harm to Gulf Power Company. Wholesale and retail electricity markets in the United States are becoming increasingly competitive. This increased competition is now causing certain information that has traditionally been filed publically on the FERC Form 1 to now be regarded as commercially sensitive and proprietary by the Company. That information is detailed data on Gulf's costs and operations. This information gives competitors a target to just match Gulf's marginal costs and operations rather than having to offer their best price possible for their own services. This does not foster a truly competitive marketplace with all participants seeking their most efficient operation and lowest costs possible. Gulf's competitors in the wholesale market are not required to make public the same commercially sensitive and proprietary information that Gulf files on FERC Form 1. Gulf's competitors, therefore, have access to details about Gulf's costs and operations that create asymmetry in the electricity market and harm competition in general and Gulf's ability to compete specifically. Thus, the Company requests that this information be granted confidential classification pursuant to Section 366.093(3)(e), Florida Statutes.

4. Submitted as Exhibit "A" is a copy of FERC Form 1, on which is highlighted the information for which confidential classification is requested. Exhibit "A" should be treated as confidential pending a ruling on this request. Attached as Exhibit "B" are two (2) edited copies of FERC Form 1, which may be made available for public review and inspection. Attached as Exhibit "C" to this request is a line-by-line/field-by-field justification for the request for

confidential classification.

5. The material for which confidential classification is requested is intended to be, and is treated as, confidential by Gulf Power Company and has not been otherwise publicly disclosed. This information is the subject of a Request for Confidential Classification before the Federal Energy Commission.

WHEREFORE, Gulf Power Company respectfully requests that the Commission enter an order protecting the information highlighted on Exhibit "A" from public disclosure as proprietary confidential business information.

Respectfully submitted this 28th day of April 2000.

Russell A Badders

JEFFREY A. STONE
Florida Bar No. 325953
RUSSELL A. BADDERS
Florida Bar No. 007455
Beggs & Lane
P. O. Box 12950
(700 Blount Building)
Pensacola, FL 32576-2950
(850) 432-2451
Attorneys for Gulf Power Company

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION; COX COMMUNICATION GULF COAST, L.L.C., *ET AL.*

Complainants, **P.A. No. 00-004**

v.

GULF POWER COMPANY,

Respondent.

To: Cable Services Bureau

THIRD AFFIDAVIT OF MICHAEL R. DUNN

I, Michael R. Dunn, being duly sworn, depose, and state as follows:

I. Background

1. I am employed by Gulf Power Company ("Gulf"), One Energy Place, Pensacola, Florida 32520-0302. I have been employed with Gulf since 1968. In my position as Project Services Manager, I have management responsibility over attachments made by third parties to Gulf's distribution poles, including responsibility over pole attachments that are subject to the Pole Attachment Act, 47 U.S.C. ¶ 224.

II. Previous Affidavit

2. In their Complaint, the Complainants repeat many of the arguments made in their Petition for Stay that were refuted in my affidavit filed with Gulf's Answer to Petition for Temporary Stay ("First Affidavit") and my affidavit filed with Gulf's motion to strike ("Second Affidavit"). In particular, I presented in both affidavits evidence refuting Complainants' arguments pertaining to the termination of pole attachment agreements and Gulf's willingness to negotiate and provide information to the cable companies. The testimony and evidence that I submitted in the First Affidavit and Second Affidavit equally applies to Gulf's response to the allegations made in the Complaint. I hereby incorporate by reference the First Affidavit and Second Affidavit in its entirety.

III. Complainants' Failure to Negotiate

3. Paragraph 26 of each of the Complainants' previous pole attachment agreements, as provided in Attachments A, B, C and D to my First Affidavit, requires that all notices to Gulf under those agreements be addressed to the person holding the position at Gulf that I have occupied for the past seven years. Along with this designation as the point of contact at Gulf for such notices and communications, I have the responsibility to negotiate any agreement changes. After the initial meetings with the designated points of contact for Comcast Cablevision of Panama City, Inc. ("Comcast") and Mediacom Southeast LLC ("Mediacom"), which were initiated by me to explain the new Pole Attachment Agreement, neither of these companies has attempted to meet to negotiate any changes to Gulf's proposal. Cox Communications Gulf Coast, L.L.C.

("CCGC") has not accepted any of my offers to meet and discuss the new Pole Attachment Agreement. Contrary to the assertions in the petitioner's opposition to motion to dismiss, I have *not* said that "no negotiation was possible." It is simply false to say that I have refused to negotiate with any of the Complainants at any time. I have repeatedly offered to explain Gulf's use of replacement cost in an attempt to establish a fair payment by Complainants that approaches just compensation.

4. As demonstrated in Section II of my First Affidavit, ample notice of changes and a willingness to negotiate have been provided in all cases. Indeed, I have offered to discuss just compensation with all the Complainants, but they have deliberately ignored my offer and refused to engage in any meaningful discussions. It is the Complainants who have failed to negotiate by refusing to pursue any discussion of just compensation. However, the Complainants' failure to discuss just compensation or otherwise negotiate with Gulf follows the course being set by them in their rhetoric about maintaining the "status quo." The Complainants openly declare in their filings before the Commission that their idea of status quo is requiring Gulf's customers to continue their over 20-year subsidization of Complainants with artificially low pole attachment fees. Complainants consciously avoid even mentioning that the Eleventh Circuit has mandated in *Gulf Power I* that the actual status quo now includes just compensation from attachers to the utilities' poles.

5. Because they want to maintain subsidized pole attachment fees as their concept of "status quo", the Complainants made it clear, both when Gulf tried to engage them in meaningful negotiations and in their filings with the Commission, that they have

no intention of discussing just compensation for their taking of Gulf's property. Real negotiations would put an end to the Complainants' attempts to have both mandatory access and a fee based on a formula that amounts to 12% of Gulf's replacement cost fee. Contrary to the claim in the Complainants' opposition to motion to dismiss, it is the Complainants, not Gulf, who are seeking to "have it both ways." Now that the Complainants have the right of mandatory access to Gulf's property, they cannot avoid their legal obligation to pay a full and perfect price for taking that property.

IV. Increase on Cost per Customer Basis

6. In footnote 13 (at pages 14-15) of their opposition to the motion to dismiss, Complainants take issue with the otherwise uncontroverted fact that the Complainants are only alleging monetary harm that is of the degree of cost normally absorbed by businesses. They attempt to do this by challenging whether there is any methodology to support my statement in the First Affidavit (which statement is neither disputed nor contradicted by Complainants in their opposition) that "if Cox were to pass through 100% of the increase to its customers (which it would not have to do), the increase from the previous rate calculation to just compensation amounts to approximately $1.10 per Cox customer per month." First Affidavit at ¶ 11. The method of calculation is not confounding.

7. Gulf used a readily available and locally obtained cable industry estimate of approximately 150,000 subscribers to CCGC in Gulf's service area. This figure is within 6% of the number of subscribers (160,000) that Mr. Gregory, Vice President and General Manager of CCGC, specified in his first affidavit, Exhibit 7 of the Complaint. The

potential increase rate per month per customer is then derived from a simple calculation: The total annual cost difference divided by the number of CCGC subscribers divided by 12 months per year. This resulted in Gulf's calculation of $1.10, but using the data relied upon by Mr. Gregory, CCGC, and Complainants in their exhibits, the rate is even less, as is the actual corresponding impact on Complainants. Using Mr. Gregory's own numbers of 160,000 subscribers and 61,581 poles owned by Gulf, the increase becomes $1.02 per CCGC customer per month. It is CCGC's sole prerogative whether any or all of this increase is actually passed through to its customers or absorbed in the business.

8. I have reviewed reports of the Commission and other documents in the public domain and that also were submitted by Alabama Power Company ("APCO") as exhibits to its answer to the complaint in *Alabama Cable Telecommunications Association*, FCC P.A. No. 00-003. These reports and documents reveal that cable rates have been steadily increasing over the years with no drop in demand.

9. The Commission recognized in its *Report on Cable Industry Prices; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 12 FCC Rcd. 3239 (Jan. 2, 1997) ("*Report on Cable Industry Prices*"), that from January 1990 to April 1993 (prior to cable regulation), there was an average annual growth rate in cable rates of 8%. The Commission's report also noted that even after regulation (from April 1993 to November 1996), cable rates continued to rise at a 2.2% annual rate. I have reviewed the U.S. Department of Labor, Bureau of Statistics Consumer Price Index for cable television (**Attachment T** to this affidavit), and it shows that from 1990-2000 cable rates rose an average of 5.83%.

10. In 1997-1998, the Commission reported that average monthly rates for both regulated and unregulated cable companies rose by rates of 6.8% and 8.9%, respectively. *Report on Cable Industry Prices; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 14 FCC Rcd. 8331 (May 7, 1999). The Commission also reported that just last year, in 1999, regulated and unregulated rates rose from 4.6% and 5.8%, respectively. *Report of Cable Industry Priced; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 2000 WL 767685, *2 (June 5, 2000) ("*2000 Report*"). Yet, Complainant Comcast reported that in a three-month period during 1999 alone, it added 20,600 basic cable customers, representing a 1.3% twelve month trailing growth rate. (**Attachment U** to this affidavit.) During first quarter 1999, Comcast added more than 20,000 customers to its high speed data service, and in April alone added 5,700 new digital cable subscribers (**Attachment U** to this affidavit.) In 1999, basic subscriptions grew cable industry wide 1.8% to 67.3 million. (**Attachment S** to this affidavit, at 6) There was also an industry-wide surge in the "new services sector." Cable added 1.4 million high-speed data customers in 1999. (**Attachment S** at 6) Digital subscriptions "increased to over 5.1 million, from just 1.4 million at year end 1998." (**Attachment S** at 6) Analysts project that by 2010, there will be 59 million digital set top boxes in the field, with 31 million cablephone subscribers and 25 million high-speed modem users. (**Attachment S** at 5)

11. The Commission's own studies explain the counter-intuitive fact that even as cable companies continue to increase their rates, they continue to add subscribers. The Commission found that "[competitive status, non-urban population, and average monthly

rate[s]" are all variables which have an inverse effect on the demand for cable services. (*2000 Report* at *16) As these variables increase, the demand for cable services decrease. In the end, however, the Commission concluded that "demand for cable service is [only] somewhat sensitive to changes in cable rates." (*2000 Report* at *18) The *2000 Report* also explained that any downward pressure on the demand for cable services caused by increased rates is more than offset by the upward momentum enjoyed by cable companies from increase in such variables as "median household income, number of homes passed, and number of satellite channels offered." (*2000 Report* at *16) That is, as these variables increase, the demand for cable services increases. With further improvements and expansion, it is intuitive that cable companies are going to continue to increase rates as they continue to provide more services and better quality. At the same time, they will continue to add customers, expand revenues and reap more profits.

12. The Commission recognized the trend in a recent report titled *1999 Assessment of the Status of Competition in Markets for the Market Delivery of Video Programming*. (MVCG, March 2000) at 1. (**Attachment V** to this affidavit at 1) The Commission found that "[d]espite . . . increased competition, . . . cable rates rose faster than inflation."(**Attachment V** at 1) The Commission also determined that notwithstanding the rate increases, "the cable industry continued to grow in terms of subscriber penetration, channel capacity, the number of programming services available, revenues, audience ratings, and expenditures on programming." (**Attachment V** at 2) Cable customers are well adjusted to and undeterred by the fact that cable rates have historically increased and will continue to do so. From the Commission reports and

studies and the other public studies, it is evident that there is little to no real likelihood that the increase in expenses attributable to pole attachments will result in any lost customers to cable companies.

13. According to an article in *Network World Article* (4/24/00), (**Attachment W** to this affidavit), the top seven cable companies (which include the Complainants Comcast and CCGC) "invested between $9 billion and $11 billion [in 1999] to upgrade their networks." (**Attachment W** at 3) "That is on top of about $6 billion they spent in 1998 (**Attachment W** at 3) From a prudent, business standpoint, it is difficult, if not impossible, to perceive that these companies would take on multi-billion dollar expansions without foreseeing incredible expansion in revenues. Revenues generated from multi-billion dollar expansions will obviously dwarf the increase in pole attachment fees. There is no indication in these events or historically that these multi-billion dollar expansion efforts will be halted because pole expenses climb from less than 1% of the cable companies' operating expenses to as little as 4%.

14. Paul Kagan Associates, Inc., a cable industry analyst, believes most of the expenses for expansions are complete. (*The Cable TV Financial Databook 2000*, Paul Kagan Associates, Inc., Attachment S to this affidavit) The activities of Comcast confirm Kagan's observations. Comcast has reported that "83% of the subscribers are in rebuilt systems." (*Multichannel Video Compliance Guide* - 11/15/99, at 8, **Attachment X** to this affidavit) Paul Kagan Associates, Inc. stated, "Operators have a diminishing amount of build-out work ahead, and they are already realizing meaningful revenues from those services they spent so lavishly to deploy." (**Attachment S** at 149) It is evident that

increases in pole attachment fees are not likely to reverse expansion already completed or to slow down the incredible momentum cable companies currently enjoy.

V. The Cable Rate

15. The Commission's regulation found at 47 C.F.R. §1.404(j) requires utilities to attach to their response to a complaint the data specified at 47 C.F.R. § 1.404(j). Although it is my understanding that Gulf is under no obligation to provide that information because the Commission lacks jurisdiction to adjudicate this Complaint, **Attachment A** provides (without waiving Gulf's jurisdictional objection) information responsive to that regulation.

16. The Commission's Report and Order in the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 (the "Order"), largely reaffirms the Commission's requirement that embedded costs be used and the methodology that the Commission has long required for determining pole attachment rates for cable television attachments. As shown in Appendix C-2 to the Order, the Commission has adopted specific calculations to develop that rate (hereinafter referred to as the "Cable Rate"), with the overall calculation essentially being Pole Investment X Space Allocation Factor X Carrying Charge Rate. As shown by **Attachment B**, using information requested by the Commission in 47 C.F.R. § 1.404(g) (see **Attachment A**) and using all of the Commission's assumptions for pole height and space allocation the Cable Rate for Gulf would have been $4.61, based upon $183.43 (Investment) X 7.41% (space allocation) X 33.945% (carrying charge). It should be emphasized that the Order does not allow any allocation for unusable space and does not allow pole owners to

recover cost items from all FERC accounts that are properly attributable to cable attachments. The accounts erroneously omitted from the Commission's rate are:

FERC Capital Accounts:

360 (Land and Land Rights)
365 (Overhead Conductors and Devices) (Grounding)
368 (Line Transformers) (Arresters)
389-399 (General Plant)

FERC Operation and Maintenance ("O&M"):

580 (Operation Supervision and Engineering)
583 (Overhead Line Expenses)
588 (Miscellaneous Distribution Expenses)
590 (Maintenance Supervision and Engineering)
598 (Maintenance of Miscellaneous Distribution Plant).

As Gulf and other electric utilities have informed the Commission in previous filings regarding pole attachments, fair allocations must be made on certain of these accounts. In addition, and as discussed later in this affidavit, the Commission's rebuttable presumptions regarding pole height and usable space do not reflect the actual experience of Gulf regarding its poles.

VI. The Telecom Rate

17. In its Report and Order In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996, CS Docket No. 97-151 (the "Telecom Rate Order"), the Commission promulgated regulations governing the rates to be charged for telecommunications attachments. For all practical purposes, the only difference from the Cable Rate is that the Telecom Rate contains a different space allocation. Specifically, while the Cable Rate's allocation is limited to only usable space, the Telecom Rate

contains an additional allocation for unusable space. As shown in **Attachment C** to this Affidavit, a fully phased-in Telecom Rate for Gulf would have been $17.86.

18. As demonstrated above and by the information in **Attachments B and C,** the Telecom Rate produces a rate that is nearly **four times** that produced by the Cable Rate. From a cost-basis, there is no justification for this difference. Under both rates, the attachment, regardless of whether it is used solely to provide cable television or telecommunications services, occupies one foot of space, and therefore both types of attachments impose the same burden and costs upon Gulf. As discussed above, the only appreciable difference between the two rates is that the Telecom Rate contains an allocation of unusable space, which is appropriate because the unusable space is of equal benefit to all attachers on the pole, regardless of the amount of usable space they occupy. In other words, the cable companies' portion of usable space is not suspended in mid-air but instead is supported by the unusable space. Proper ground clearance and required spacing from other attachers cannot be maintained without this "unusable space." Indeed, if the cable companies were to build an independent system of poles, those poles would undoubtedly have similar amounts of unusable space, which is to say that the cable companies would not construct a system of one-foot high poles. As such, the attachers should bear their fair share for the costs associated with unusable space. Since the Cable Rate does not appropriately allow for the recovery of those legitimate cost items, it does not allow the pole owner to recover all of its costs associated with cable attachments. Furthermore, it should be emphasized that the Cable Rate -- in all instances -- results in a subsidy to the cable companies because there are costs associated with unusable space in

all instances. In other words, the costs associated with unusable space will never be zero because attachments require unusable space for safety and other reasons.

VII. Replacement Cost Attachment Charge

19. It is my understanding that there are various alternatives for determining just compensation for property that has been taken, and that a replacement cost-based approach is only one of those means. To the extent that a cost-based approach is used, the use of replacement cost is much more appropriate than the use of embedded cost because the latter has little to do with the value of the property at the time that the taking occurs, and in the present case the taking is on-going in nature. In addition, replacement cost is more appropriate in this instance because an alternative to taking Gulf's property is for the attacher to construct an independent system of poles, which system would necessarily be priced at replacement cost. It is also my understanding that just compensation should be the full and perfect value of the property taken, which (from a cost-based perspective) should mean that all costs incurred related to the taking should be recovered. Based upon these principles, I have developed a replacement cost-based approach that provides a conservative estimation of what a replacement cost price should be. Gulf's replacement cost price is based upon the formula of Pole Investment X Space Allocation Factor X Carrying Charge Rate.

20. Pole Investment - As shown in **Attachment D**, the investment is based upon the replacement cost of a bare, 40-foot pole in 1999. In addition, as discussed in the comments made by electric utilities to the Commission previously in pole attachment proceedings a small portion of the costs of grounds and arresters has been incorporated.

The costs of a small portion of the grounds and arresters (4 each per mile) should properly be included in any pole attachment rate because the grounds are needed to meet the National Electrical Safety Code requirements and the grounds and arresters help to protect all attaching parties in Gulf's high lightning prone service area from lightning surges, lightning strikes, stray interference, induced voltages and power surges. Indeed, if a cable company was to independently build/replace its own, independent system of poles, it would unquestionably use grounds and arresters to protect its equipment and personnel. In addition, a small portion of initial right of way clearing costs has been included because, again, Gulf incurs such initial clearing costs in building its system. An allocation for General Plant is also included. General Plant is similar to Administrative and General (A&G) expenses that are already included in the Cable Rate because a portion of the costs are attributable to distribution poles and the attachments thereon. For example, the costs of desks, telephones, computers and buildings used by employees in administering pole attachment contracts are recorded in General Plant. Other relevant General Plant costs include, but are not limited to, transportation equipment used to install and maintain distribution poles and other equipment used to move and store the poles. Combining these elements produces a total investment of $467.84 per pole.

21. Space Allocation Factor - As shown in **Attachment D**, the pole space allocation factor is based upon Congress's recognition in the 1996 Amendments to the Pole Attachment Act of the obvious fact that the unusable space on a pole is of equal benefit to all parties, and thus an allocation is made for both usable and unusable space. In addition, this factor is based upon a 40-foot pole, with 7.5 feet allocated to electric

utility attachments, 3.0 feet for telephone company attachments, and 1 foot for cable or telecommunications attachments. The use of a 40-foot pole is appropriate for Gulf because, as shown in **Attachment E**, Gulf's average installed pole is 39.94 feet in height based on all poles installed in 1999, further demonstrating the reasonableness of utilizing a 40-foot average pole height. The use of 7.5 feet for power attachments and 3.0 feet for telephone company attachments is appropriate because both dimensions are compatible with Southern Company Distribution Construction Standards and Gulf's Joint Use Agreements with the telephone companies. Also, according to a 100% count of all poles in 1996 on Gulf's system to which telephone and cable company facilities are attached, the actual average number of attachers to Gulf's poles is 2.64 (including Gulf.) The appropriate division of unusable space is therefore obtained by multiplying the unusable space by a factor of 1/2.64.

22. Carrying Charge Rate - The carrying charge rate is based upon gross investment and incorporates all of the appropriate FERC O&M Costs and A&G accounts that the electric utilities have previously demonstrated are properly attributable to costs incurred due to attachments. In addition, an incremental, forward-looking cost of capital was used due to the forward-looking nature of this methodology. The use of current incremental capital component costs, as opposed to embedded levels, more appropriately reflects the opportunity costs of the funds invested by a company and the prospective alternative returns foregone by an investor. Accordingly, a company will continue to invest in real physical assets only if the anticipated return on such investments equals or exceeds its incremental weighted cost of capital. Thus the weighted cost of capital

represents the minimum rate of return which must be earned to justify the investment. Additionally, revenue and earnings predicated on the incremental weighted cost of capital enable the achievement of the competitive returns required to successfully attract future capital investments. Based upon these considerations, the total carrying charge rate is 27.585%. It should be noted that this carrying charge rate is lower than that found in the Cable and Telecom rates because a gross investment as opposed to a net investment has been used as the denominator of the pertinent calculations.

23. As shown in **Attachment F**, combining these three components utilizing replacement costs produces an annual payment for pole attachments of $38.06 per pole based on fiscal year 1999 data.

24. It should be emphasized that this replacement cost charge is a highly conservative number that would only begin to move Gulf towards the constitutionally required full and perfect price, and makes no recognition of the alternative valuation methods for determining just compensation. In addition, this replacement cost methodology does not include, for example, any enhancement value to recognize the linear corridor and access to Gulf's customers. This linear corridor is a clear zone having the unique characteristics of being the proper height above ground and the proper distance from other attachers to allow the cable companies to safely install and maintain its cables along a continuous, unobstructed route from their point of origin all the way to the customer's premises. This provides a network of linear corridors of tremendous value to the cable companies. Indeed, the Affidavit of Mr. Henry J. Wise that is being filed contemporaneously establishes that a 30% enhancement factor representing the value of

the linear corridor that Gulf has built is appropriate. Other examples of the conservative nature of these numbers also include the use of gross investment in determining the carrying charge rate and the lack of compensation for the full liability of Gulf's poles being located in road rights-of-way. To the extent that someone should try to challenge the specifics of this methodology or its individual components, recognition of these considerations must be taken into account and that none of the alternative methodologies for determining just compensation has been utilized.

VIII. Depreciation Study

25. On July 7, 1998, the Florida Public Service Commission issued Order No. PSC-98-0921-FOF-EI in Docket No. 970643-EI approving new depreciation rates for Gulf effective January 1, 1998. Included in **Attachment G** is an analysis of FERC Account 364, Poles, Towers and Fixtures from Gulf's approved depreciation study. As shown in that study, it was determined, among other things, that the average service life of this category of equipment is 32 years with an average remaining life of 24 years.

IX. Internet Access

26. In his second declaration, Mr. Gregory states that "[c]ontrary to Gulf Power's assertions, Internet service is not available on portions of Cox Gulf Coast's cable systems that are attached to Gulf Power's utility poles." Gregory Second Declaration at ¶ 3. Complainants then make the bald assertion in their opposition to the motion to dismiss that *"no* Internet service is available on portions of Cox Gulf Coast's cable systems that are attached to Gulf Power's utility poles." Opposition at 6. These statements are unsupported by any evidence. The representations are at best grossly misleading, if not

patently false. Complainants have submitted no evidence to refute the evidence already submitted by Gulf as Exhibit 1 to the motion to dismiss. **Attachment J** to this affidavit contains even more information, brochures, and pictures of billboard advertising generated by CCGC itself that undeniably establish that CCGC is providing and commingling Internet service with its cable services to subscribers through the attachments on Gulf's poles.

27. Supplementing the information already provided in Exhibit 1 to the motion to dismiss, **Attachment H** to this affidavit contains information, brochures, and pictures of billboard advertising generated by Comcast itself that undeniably establish that Comcast is providing and commingling Internet service with its cable services to subscribers through the attachments on Gulf's poles.

28. Supplementing the information already provided in Exhibit 1 to the motion to dismiss, **Attachment I** to this affidavit contains information, brochures, and pictures of billboard advertising generated by Complainant Mediacom itself that undeniably establish that Mediacom is providing and commingling Internet service with its cable services to subscribers through the attachments on Gulf's poles.

X. Document Authentication

29. I hereby verify that I am familiar with the documents attached as **Attachments A through Z** to this affidavit; that they are true and correct copies of either documents I have obtained or compiled from Complainants or their resources, documents or reports found in the public domain, documents and records made and kept in the regular course of business of Gulf Power Company, or documents or records compiled,

made, or kept under my direction and supervision and that they are true and correct copies of the documents for the purpose that they were furnished.

Affiant says nothing further.

Michael R. Dunn

Michael R. Dunn

STATE OF FLORIDA)
)
COUNTY OF ESCAMBIA)

Michael R. Dunn, being first duly sworn, deposes and says that he has read the foregoing Affidavit of Michael R. Dunn, and that the matters and things set forth therein are true and correct to the best of his knowledge, information, and belief.

Sworn to and subscribed before me this 8th day of August 2000.

NOTARY PUBLIC STATE OF FLORIDA
LINDA C. WEBB
Notary Public-State of FL
Comm. Exp: May 31, 2002
Comm. No: CC 725868

Linda C. Webb
Notary Public

My Commission Expires: May 31, 2002

Confidential Information Removed

Public Viewing Is Permissible

Gulf Power Company
Response for Data and Information
Specified in 47 CFR § 1.1404(g)
(Based On December 31, 1999 Data)

A

(1) The gross investment by the utility for pole lines:

Response:

The gross investment in poles in [redacted]

(2) The investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available:

Response:

$7,268,981 (utilizes Commission's 15% reduction of net pole investment).

(3) The depreciation reserve from the gross pole line investment:

Response:

The depreciation reserve from gross pole line investment is $30,148,830.

(4) The depreciation reserve from the investment in crossarms and other items which do not reflect the cost of owning and maintaining poles, if available:

Response:

See (2) above.

(5) The total number of poles: (i) Owned; and (ii) controlled or used by the utility:

Response:

(i)	Owned by Gulf	224,555 distribution poles
(ii)	Used by Gulf	66,440 distribution poles

(6) The total number of poles which are the subject to the pole attachment agreement:

Response:

61,640 poles for Cox Communications Gulf Coast, 13,392 poles for Comcast and 11,622 poles for Mediacom, as of December 31, 1999.

(7) The number of poles included in (6) that are controlled or used by the utility through lease between the utility and other owner(s), and the annual amounts paid by the utility for such rental;

Response:

None. All of the poles in specified in (6) above are owned solely by Gulf Power.

(8) The number of poles included in (6) that are owned by the utility and that are leased to others by the utility, and the annual amounts paid to the utility for such rental;

Response:

Not applicable.

(9) The annual carrying charges attributable to the cost of owning a pole (these charges may be expressed as a percentage of the net pole investment) and the treatment of accumulated deferred taxes:

Response:

If FCC methodologies were applicable and Gulf Power Company was restricted to their use, the annual carrying charge would be 33.945%. Concerning the treatment of accumulated deferred taxes, the Florida Public Service Commission has historically included deferred income taxes in the utility's capital structure at zero cost. Please see page 22 of Order 23573 (enclosed) from Gulf's last full requirements rate case outlining the appropriate capital structure for the company.

(10) The rate of return authorized for the utility for intrastate service:

Response:

Gulf has computed a before tax rate of return of 7.757% using the midpoint of its most recently approved return on equity (ROE) range of 10.5% to 12.5%. However, a stipulation approved by the FPSC on October 28, 1999 allows the Company to earn outside its authorized range for ROE. References enclosed: Order PSC-99-1970-PAA-EI, dated October 8, 1999, and Order PSC-99-2131-S-EI, dated October 28, 1999.

(11) The average amount of usable space per pole for those poles used for pole attachments:

Response:

11.5 feet

(12) The average amount of unusable space per pole for those poles used for pole attachments:

Response:

28.5 feet

(13) Reimbursements received from CATV operators for non-recurring costs:

Response:

Not applicable.

Supplement To
Question (9.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Gulf Power Company for an increase in its rates and charges.	)	DOCKET NO. 891345-EI
	)	ORDER NO. 23573
	)	ISSUED: 10/3/90

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER

Pursuant to duly given notice, the Florida Public Service Commission held public hearings in this docket on April 5, 1990, in Panama City, Florida; April 4, 1990, in Pensacola, Florida; and June 11 through June 21, 1990, in Tallahassee, Florida. Having considered the record herein, the Commission now enters its final order.

APPEARANCES: G. EDISON HOLLAND, JR. and JEFFREY A. STONE, Esquires, Beggs and Lane, P. O. Box 12950, Pensacola, Florida 32576
<u>On behalf of Gulf Power Company</u>

JACK SHREVE and STEPHEN C. BURGESS, Esquires, Office of the Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400
<u>On behalf of the Citizens of the State of Florida</u>

GARY A. ENDERS, Major, USAF, HQ USAF/ULT, Stop 21, Tyndall AFB, Florida 32403-6001
<u>On behalf of the Federal Executive Agencies</u>

JOSEPH A. McGLOTHLIN and JOHN W. McWHIRTER, JR., Esquires, Lawson, McWhirter, Grandoff & Reeves, 522 East Park Avenue, Suite 200, Tallahassee, Florida 32301
<u>On behalf of the Industrial Intervenors</u>

RONALD C. LaFACE and WILLIAM L. HYDE, Esquires, Roberts, Baggett, LaFace and Richard, P. O. Drawer 1838, Tallahassee, Florida 32302
<u>On behalf of the Florida Retail Federation</u>

rated utility bonds as reported by Moody's Bond Survey, July 16, 1990.

C. Capital Structure Reconciliation

We require that there be a reconciliation of the rate base and the capital components which support the rate base. In order to determine the appropriate overall cost of capital for which the utility will be allowed to earn a return, several adjustments must be made to the capital structure as presented by the utility in its minimum filing requirements. First, as all parties agree, the preferred stock balance is to be presented net of discounts, premiums, and issuance expenses. The effect on capital structure is to reduce the preferred stock balance by $948,000 and to increase the common equity balance by $948,000.

Next, we believe all non-utility investment should be removed directly from equity when reconciling the capital structure to rate base unless the utility can show, through competent evidence, that to do otherwise would result in a more equitable determination of the cost of capital for regulatory purposes. In the case of Gulf, we believe that the non-utility investments should be removed from equity. This will recognize that non-utility investments will almost certainly increase a utility's cost of capital since there are very few investments that a utility can make that are of equal or lower risk. Removing non-utility investments directly from equity recognizes their higher risks, prevents cost of capital cross-subsidies, and sends a clear signal to utilities that ratepayers will not subsidize non-utility related costs.

We believe that specific adjustments should be made to the tax components of the capital structure. We have specifically identified the effects of the rate base adjustments for the navy house, the Tallahassee office, Leisure Lakes, unamortized rate case expense, and Plant Scherer, including the plant acquisition adjustment, and have decreased the average balance of accumulated deferred income taxes by $5,877,000 and of investment tax credits by $2,402,000. The remaining amount of these rate base adjustments are then reconciled over all investor sources and customer deposits.

All other adjustments to rate base are on a pro rata basis over all sources of capital. We believe the remaining adjustments should be removed at the company's overall cost of capital.

Based upon the rate base/capital structure reconciliation that we discussed above and our review of the record of the cost rates and capital components, the appropriate capital structure for Gulf Power is as follows:

COMPONENT	AMOUNT	PERCENT OF TOTAL CAPITAL	COST RATE	WEIGHTED COST
Long Term Debt	311,950	36.22%	8.72%	3.16%
Short Term Debt	3,971	0.46%	8.00%	0.04%
Preferred Stock	51,358	5.96%	7.75%	0.46%
Customer deposits	14,134	1.64%	7.65%	0.13%
Common Equity	264,857	30.76%	12.55%	3.86%
Accumulated Deferred Income Taxes	175,796	20.41%	0.00%	0.00%
Deferred ITC - Zero Cost	823	0.10%	0.00%	0.00%
Deferred ITC - Weighted Cost	38,270	4.44%	10.26%	0.46%
	861,159	100.00%		8.10%

For a complete breakdown of Gulf's 13-month average capital structure see Attachment 2.

Gulf Power Company
Environmental Cost Recovery Clause
Calculation of Revenue Requirement Rate of Return

Line	Capital Component	(1) Jurisdictional Rate Base 1990 Test Year ($000's)	(2) Ratio %	(3) Cost Rate %	(4) Weighted Cost Rate %	(5) Revenue Requirement Rate %	(6) Monthly Revenue Requirement Rate %
1	Bonds	311,950	36.2244	8.72	3.1588	3.1588	
2	Short-Term Debt	3,971	0.4611	8.00	0.0369	0.0369	
3	Preferred Stock	51,358	5.9638	7.75	0.4622	0.7525	
4	Common Stock	264,857	30.7559	11.50	3.5369	5.7581	
5	Customer Deposits	14,134	1.6413	7.65	0.1256	0.1256	
6	Deferred Taxes	175,796	20.4139				
7	ITC-3%	823	0.0956				
8	ITC-Other	38,270	4.4440	9.81	0.4361	0.5890	
9	Total	861,159	100.0000		7.7565	10.4209	0.8684
	ITC Component:						
10	Debt	311,950	49.6605	8.72	4.3304	0.1924	
11	Equity-Preferred	51,358	8.1759	7.75	0.6336	0.0458	
12	-Common	264,857	42.1636	11.50	4.8488	0.3508	
13		628,165	100.0000		9.8128	0.5890	
	Breakdown of Revenue Requirement Rate of Return between Debt and Equity:						
14	Total Debt Component (Lines 1, 2, 5, and 10)					3.5137	0.2928
15	Total Equity Component (Lines 3, 4, 11, and 12)					6.9072	0.5756
16	Total Revenue Requirement Rate of Return					10.4209	0.8684

Notes:
(1) From Order 23573 dated 10/3/90 from Gulf's last rate case
(2) Column (1) / Total Column (1)
(3) From Order 23573 dated 10/3/90 from Gulf's last rate case, except ROE is 11.50% based on action by the FPSC at the 10/5/99 agenda conference
(4) Column (2) x Column (3)
(5) For equity components: Column (4) / (1-.38575); 38.575% = effective income tax rate
For debt components: Column (4)
(6) Column (5) / 12

Effective Tax Rate: 38.575

Revenue Expansion Factor:

	100.0000
FPSC Assessment Fee	0.0720
Gross Receipts Tax	1.5000
	98.4280
	1.01597

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the earnings and authorized return on equity of Gulf Power Company.	DOCKET NO. 990250-EI
In re: Petition for a full revenue requirements rate case for Gulf Power Company by the Citizens of the State of Florida.	DOCKET NO. 990947-EI ORDER NO. PSC-99-2131-S-EI ISSUED: October 28, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER APPROVING STIPULATION, WITHDRAWING PAA ORDER, AND CLOSING DOCKETS

BY THE COMMISSION:

I. CASE BACKGROUND

By Order No. PSC-99-1047-PAA-EI, issued on May 24, 1999, in Docket No. 990250-EI, we approved a three year regulatory incentive plan for Gulf Power Company (Gulf or the Company). This Order addressed, among other things, Gulf's regulatory assets and authorized return on equity (ROE). Order No. PSC-99-1047-PAA-EI was protested by the Coalition for Equitable Rates (Coalition) on June 14, 1999. On July 22, 1999, the Office of Public Counsel (OPC) filed a Petition for a Full Revenue Requirements Rate Case for Gulf Power Company. This Petition was assigned Docket No. 990947-EI.

In Docket No. 990947-EI, on October 1, 1999, OPC, Gulf, FIPUG, and the Coalition filed a Stipulation and Settlement (Stipulation) that resolves the issues raised in that docket. In Docket No. 990250-EI, on October 1, 1999, the Coalition and Gulf filed a Joint

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FPSC-RECORDS/REPORTING

Request that Dockets be Terminated and Closed to Further Action. This Order addresses these two filings.

II. STIPULATION AND SETTLEMENT

In summary, the Stipulation, which is attached to this Order as Attachment A and is incorporated herein by reference, requires that:

1. base rates be reduced by $10 million per year, effective 30 days following the vote of the Florida Public Service Commission (Implementation Date);

2. revenues between certain levels will be shared by Gulf and its customers, on a one-third/two-thirds basis respectively, beginning October 1, 1999 and ending sometime during 2002;

3. revenues in excess of the sharing level will be refunded entirely to Gulf's customers;

3. Gulf will have the discretion to record an additional accrual of up to $5 million per year to its Property Insurance Reserve and up to $1 million per year to reduce the accumulated balance of the deferred return on the third floor of the corporate offices;

4. if Gulf's achieved return on equity is outside the authorized range, then the revenue sharing mechanism is intended to be the appropriate and exclusive mechanism to address that circumstance; and,

5. the parties will not seek any additional rate decrease or increase in Gulf's base rates or charges.

Paragraph 2 addresses the up-front reduction in base rates and Paragraph 4 addresses the allocation of any refunds pursuant to the sharing mechanism. Under the Stipulation, both refunds are to be allocated on an energy basis. While it has been suggested that allocating the reduction on a demand and energy component better matches the way dollars are collected through base rates, we recognize that the reduction in the base rate energy charge for all customers is administratively quicker to implement and more easily explained to customers. Similarly, since any shared revenue credits are to be shown as a separate line item on the bill, allocating these dollars on an energy basis makes the credit easier for the customers to relate to the other charges on their bill.

We recognize that at the conclusion of a full rate case, a greater reduction is possible. However, that would be after eight to twelve months, and is not guaranteed. In addition to the $10 million annual rate reduction, there is the potential for further credits under the revenue sharing plan.

By the terms of the Stipulation, the parties waive any right to contest Gulf's earnings should Gulf achieve a level of earnings outside its authorized range. However, we maintain our authority to review Gulf's earnings during the period of the Stipulation.

Paragraph 6 of the Stipulation states:

> Gulf Power Company's authorized return on equity range is not altered as a result of this Stipulation and Settlement and no party to this Stipulation and Settlement will seek a change in the authorized return on equity range to be effective until after the Expiration Date; it being understood that during the term extending from the Implementation Date through the Expiration Date **the achieved return on equity may, from time to time, be outside the authorized range** and the sharing mechanism herein described is intended to be the appropriate and **exclusive** mechanism to address that circumstance. (Emphasis added.)

In Florida, the historical use of the authorized return on equity (ROE) is to compare a utility's achieved return to its authorized return. If a utility earns above the top of the range of its authorized return, then it is over earning. The overearnings can be quantified in dollars using the top of the range of the authorized ROE. The Commission then disposes of the overearnings through rate reductions, offsets with regulatory assets, or another way.

This Stipulation will alter the relationship between ROE and excess earnings. With the Stipulation, the revenue sharing mechanism is the sole methodology for addressing excess earnings, i.e., earnings above the top of the authorized range. With the sharing mechanism, Gulf could earn above to top of its authorized range for ROE. Therefore, this Stipulation requires a fundamental change in its traditional rate base and rate of return regulation. The Stipulation is essentially based on revenues, not earnings.

We have approved other sharing plans. In Docket No. 880069-TL, the Commission approved a rate stabilization plan for Southern Bell. This plan had a sharing mechanism in which revenues were shared between customers and shareholders from the point at which earnings exceeded the top of the range for ROE. The proposed Stipulation presented by Gulf, OPC, et al, could allow earnings to exceed the authorized ROE and be retained entirely by shareholders. This will depend on Gulf's revenues and how those revenues are measured.

We have considered the impact of a stipulation on our jurisdiction in Order No. PSC-94-0172-FOF-TI, issued February 11, 1994, in Docket No. 920260-TL. In part, we stated:

> The text of the Settlement contains numerous references that purport to require us to act, to refrain from acting, or to otherwise restrict our actions in some manner, or seek action for which we have no authority. Generally, such attempts to bind us to a specified future course of action by adoption of the Settlement must fail as a matter of law. See, e.g., United Telephone Company v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986), (parties to a contract cannot confer jurisdiction). Similarly, parties cannot by contract or agreement limit or require our exercise of jurisdiction.
>
> It is our statutory responsibility to ensure that Southern Bell's rates, charges, and practices are fair, just, and reasonable. See Sections 364.01(2), 364.03, and 364.14, Florida Statutes. The terms of a contract for the rendering of a service of a public nature are subject to governmental authority. State ex rel Ellis v. Tampa Waterworks Co., 48 So. 639 (Fla. 1909).
>
> When we approve a stipulation between parties, the provisions of the stipulation become part of our order. However, we cannot, by our own order, require or preclude a future Commission from carrying out its mandate. This is analogous to the principle that in adopting legislation, the legislature is not bound by actions of prior legislatures nor can it bind future legislatures.
>
> The question of the Commission being precluded from acting was last addressed in Docket No. 880069-TL.

> There, Southern Bell argued that, in approving the parameters of the Plan, we committed to leave the Plan as is, absent some precipitous change in circumstances. Several parties had argued that, because the cost of equity capital had fallen, certain amounts of revenue should be held subject to refund, pending the outcome of the upcoming rate case. We concluded that regardless of the Plan's silence on whether it could be modified due to changes solely in the cost of equity capital and regardless of our prior approval of the Plan, we were not precluded from acting, if the public interest so required. See Order No. PSC-92-0524-FOF-TL, issued June 18, 1992.
>
> The Commission, even if it so desired, cannot be bound to a specific course of action through the approval of a stipulation. As we stated in Docket No. 890216-TL:
>
> [W]e do not possess the legal capacity of a private party to enter into contracts covering our statutory duties. Indeed, we cannot abrogate -- by contract or otherwise -- our authority to assure that our mandate from the Legislature is carried out. As a result, we may not bind the Commission to take or forego action in derogation of our statutory obligations.

See Order No. 22352, issued December 29, 1989.

> The parties are without authority to confer or preclude our exercise of jurisdiction by agreement. In our view, any such provisions in the Settlement are not fatal flaws; they are simply unenforceable against the Commission and are void ab initio. The parties cannot give away or obtain that for which they have no authority. We note that, consistent with our discussion above, the parties commented during our agenda conference that there was no intent to restrict in any fashion the Commission's responsibility or legal authority.
>
> While it is clear that we cannot be precluded from carrying out our statutory mandate by approving this Stipulation, we also understand that should we find it necessary in the future to alter the regulatory provisions we are now approving, such changes could be the basis for a party to the Settlement to abrogate the prospective portions of the agreement.

Order No. PSC-94-0172-FOF-TL at pages 5, 6.

Supplement To
Question (10.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request by Gulf Power Company for approval of prospective reduction to authorized return on equity.	DOCKET NO. 991487-EI ORDER NO. PSC-99-1970-PAA-EI ISSUED: October 8, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION
ORDER APPROVING GULF POWER COMPANY'S
REQUEST FOR REDUCTION TO AUTHORIZED RETURN ON EQUITY

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

By Order No. PSC-99-1047-PAA-EI, issued on May 24, 1999, in Docket No. 990250-EI, we approved a three year regulatory incentive plan for Gulf Power Company (Gulf or the Company). This Order addressed, among other things, Gulf's regulatory assets and authorized return on equity (ROE). Order No. PSC-99-1047-PAA-EI was protested by the Coalition for Equitable Rates (Coalition) on June 14, 1999. On July 22, 1999, the Office of Public Counsel (OPC) filed a Petition for a Full Revenue Requirements Rate Case for Gulf Power Company. This Petition was assigned Docket No. 990947-EI.

In Docket No. 990947-EI, on October 1, 1999, OPC, Gulf, the Florida Industrial Power Users Group (FIPUG), and the Coalition filed a Stipulation and Settlement (Stipulation) that resolved all the issues raised in that Docket and in Docket No. 990250-EI. We approved the Stipulation at the October 5, 1999, agenda conference. Also on October 1, 1999, Gulf filed the instant Request for Approval of Prospective Reduction to Authorized Return on Equity.

In its petition, Gulf requests the Commission approve its unilateral request for a prospective reduction in the Company's authorized return on equity (ROE) range. Although the parties to the Stipulation and Settlement filed in Docket No. 990947-EI were not able to reach an agreement on a new authorized ROE range for the Company, the Stipulation expressly allows Gulf to voluntarily agree to lower its authorized ROE on a prospective basis for the term of the Stipulation. All of the parties to the Stipulation have agreed that they will not object to or otherwise seek to modify Gulf's voluntary reduction.

In its petition, Gulf proposes that:

> Effective on the Implementation Date of the Stipulation and Settlement in Docket No. 990947-EI, Gulf Power's authorized return on equity range on a prospective basis for the term extending from the Implementation Date through the Expiration Date as defined in the Stipulation and Settlement will be 10.50% to 12.50% with a midpoint of 11.50% for all regulatory purposes.

The Company's current ROE range of 11.0% to 13.0% with a midpoint of 12.0% was approved in Order No. PSC-93-0771-FOF-EI issued May 20, 1993.

The proposed ROE midpoint of 11.5% might not be the midpoint that would be approved after a hearing. However, the benefits to customers of a lower ROE are numerous. This unilateral reduction is a movement in a direction favorable to the ratepayers. In the interest of regulatory efficiency and cost savings, we approve an authorized ROE range of 10.5% to 12.5% with a midpoint of 11.5% for Gulf Power Company for any and all regulatory purposes for the term of the Stipulation.

Gulf asks that we approve its proposed unilateral reduction as final agency action. In its request, Gulf states:

> In Order No. 18340 issued October 26, 1987 in Docket No. 870890-EI, the Commission accepted a similar proposal by Gulf Power through the issuance of a final Order without the necessity of a hearing. As part of this proposal, Gulf Power Company requests that the Commission issue a final order in the same manner that was used by the Commission in Docket No. 870890-EI.

We do not believe Gulf's request comports with the requirements of Florida Administrative Law. It is axiomatic that before an agency subject to the requirements of Chapter 120, Florida Statutes, takes final action, it must afford persons whose substantial interests are affected a point of entry to an administrative hearing. A decision to lower a utility's ROE for all regulatory purposes (as proposed here by Gulf) is final action. Thus, persons whose substantial interests are affected have a right to a hearing. Gulf's request is not consistent with that right.

The instant case is distinguishable from that referenced by Gulf in its petition. By Order No. 18430, issued October 26, 1987, in Docket No. 870890-EI, the Commission approved a unilateral proposal to reduce ROE in connection with Rule 25-14.003, Florida Administrative Code (the tax savings rule), and the calculation of Allowance for Funds Used During Construction (AFUDC) rates to be effective in 1988. The two actions described in that Order are of an interim and/or preliminary nature, with a point of entry available in a subsequent proceeding. That is not the case with the instant proposal. It appears that Order No. 18430 was issued without any Notice of Further Proceedings or Judicial Review. Thus, the characterization of that Order as a final order is debatable.

We recognize that the parties in Docket No. 990947-EI have, by the stipulation in that docket, waived any right to challenge or modify Gulf's voluntary ROE reduction. However, there may be other persons whose substantial interests are affected who have a right to a hearing on Gulf's proposal. Accordingly, we approve this request as proposed agency action.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company's Request for Reduction to Authorized Return on Equity is approved.

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 8th day of October, 1999.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 29, 1999.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
Gulf Power Company	(1) [X] An Original (2) [ ] A Resubmission	04/30/2000	Dec. 31, 1999

STATEMENT OF INCOME FOR THE YEAR

1. Report amounts for accounts 412 and 413, Revenue and Expenses from Utility Plant Leased to Others, in another Utility column (i, k, m, o) in a similar manner to a utility department. Spread the amount(s) over Lines 02 thru 24 as appropriate. Include these amounts in columns (c) and (d) totals.
2. Report amounts in account 414, Other Utility Operating income, in the same manner as accounts 412 and 413 above.
3. Report data for lines 7,9, and 10 for Natural Gas companies using accounts 404.1, 404.2, 404.3, 407.1 and 407.2.
4. Use pages 122-123 for important notes regarding the statement of income or any account thereof.
5. Give concise explanations concerning unsettled rate proceedings where a contingency exists such that refunds of a material amount may need to be made to the utility's customers or which may result in a material refund to the utility with respect to power or gas purchases. State for each year affected the gross revenues or costs to which the contingency relates and the tax effects together with an explanation of the major factors which affect the rights of the utility to retain such revenues or recover amounts paid with respect to power and gas purchases.
6. Give concise explanations concerning significant amounts of any refunds made or received during the year

Line No.	Account (a)	(Ref.) Page No. (b)	TOTAL Current Year (c)	TOTAL Previous Year (d)
1	UTILITY OPERATING INCOME			
2	Operating Revenues (400)	300-301	674,098,513	650,517,545
3	Operating Expenses			
4	Operation Expenses (401)	320-323	380,736,466	360,286,172
5	Maintenance Expenses (402)	320-323	57,830,333	57,286,304
6	Depreciation Expense (403)	336-337	62,114,162	60,319,792
7	Amort. & Depl. of Utility Plant (404-405)	336-337	4,583,810	4,637,116
8	Amort. of Utility Plant Acq. Adj. (406)	336-337		
9	Amort. Property Losses, Unrecov Plant and Regulatory Study Costs (407)			
10	Amort. of Conversion Expenses (407)			
11	Regulatory Debits (407.3)			
12	(Less) Regulatory Credits (407.4)			
13	Taxes Other Than Income Taxes (408.1)	262-263	51,781,606	51,461,681
14	Income Taxes - Federal (409.1)	262-263	33,164,538	33,488,380
15	- Other (409.1)	262-263	5,115,838	5,165,620
16	Provision for Deferred Income Taxes (410.1)	234, 272-277	19,240,853	21,223,675
17	(Less) Provision for Deferred Income Taxes-Cr. (411.1)	234, 272-277	25,691,401	25,788,197
18	Investment Tax Credit Adj. - Net (411.4)	266	-1,832,136	-1,832,136
19	(Less) Gains from Disp. of Utility Plant (411.6)			100,819
20	Losses from Disp. of Utility Plant (411.7)			57,616
21	(Less) Gains from Disposition of Allowances (411.8)		277,215	3,952,368
22	Losses from Disposition of Allowances (411.9)			
23	TOTAL Utility Operating Expenses (Enter Total of lines 4 thru 22)		586,766,854	562,252,836
24	Net Util Oper Inc (Enter Tot line 2 less 23) Carry fwd to P117,line 25		87,331,659	88,264,709

STATEMENT OF INCOME FOR THE YEAR (Continued)

resulting from settlement of any rate proceeding affecting revenues received or costs incurred for power or gas purchases, and a summary of the adjustments made to balance sheet, income, and expense accounts.

7. If any notes appearing in the report to stockholders are applicable to this Statement of Income, such notes may be included on pages 122-123.

8. Enter on pages 122-123 a concise explanation of only those changes in accounting methods made during the year which had an effect on net income, including the basis of allocations and apportionments from those used in the preceding year. Also give the approximate dollar effect of such changes.

9. Explain in a footnote if the previous year's figures are different from that reported in prior reports.

10. If the columns are insufficient for reporting additional utility departments, supply the appropriate account titles, lines 2 to 23, and report the information in the blank space on pages.122-123 or in a footnote.

ELECTRIC UTILITY		GAS UTILITY		OTHER UTILITY		Line No.
Current Year (e)	Previous Year (f)	Current Year (g)	Previous Year (h)	Current Year (i)	Previous Year (j)	
						1
674,098,513	650,517,545					2
						3
380,736,466	360,286,172					4
57,830,333	57,286,304					5
62,114,162	60,319,792					6
4,583,810	4,637,116					7
						8
						9
						10
						11
						12
51,781,606	51,461,681					13
33,164,538	33,488,380					14
5,115,838	5,165,620					15
19,240,853	21,223,675					16
25,691,401	25,788,197					17
-1,832,136	-1,832,136					18
	100,819					19
	57,616					20
277,215	3,952,368					21
						22
586,766,854	562,252,836					23
87,331,659	88,264,709					24

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
Gulf Power Company	(1) [X] An Original (2) [ ] A Resubmission	04/30/2000	Dec. 31, 1999

SUMMARY OF UTILITY PLANT AND ACCUMULATED PROVISIONS FOR DEPRECIATION. AMORTIZATION AND DEPLETION

Line No.	Classification (a)	Total (b)	Electric (c)
1	Utility Plant		
2	In Service		
3	Plant in Service (Classified)	1,813,604,499	1,813,604,499
4	Property Under Capital Leases		
5	Plant Purchased or Sold		
6	Completed Construction not Classified	31,305,624	31,305,624
7	Experimental Plant Unclassified		
8	Total (3 thru 7)	1,844,910,123	1,844,910,123
9	Leased to Others		
10	Held for Future Use	3,148,255	3,148,255
11	Construction Work in Progress	34,164,042	34,164,042
12	Acquisition Adjustments	5,605,276	5,605,276
13	Total Utility Plant (8 thru 12)	1,887,827,696	1,887,827,696
14	Accum Prov for Depr, Amort, & Depl	821,970,172	821,970,172
15	Net Utility Plant (13 less 14)	1,065,857,524	1,065,857,524
16	Detail of Accum Prov for Depr, Amort & Depl		
17	In Service:		
18	Depreciation	802,116,266	802,116,266
19	Amort & Depl of Producing Nat Gas Land/Land Right		
20	Amort of Underground Storage Land/Land Rights		
21	Amort of Other Utility Plant	19,853,906	19,853,906
22	Total In Service (18 thru 21)	821,970,172	821,970,172
23	Leased to Others		
24	Depreciation		
25	Amortization and Depletion		
26	Total Leased to Others (24 & 25)		
27	Held for Future Use		
28	Depreciation		
29	Amortization		
30	Total Held for Future Use (28 & 29)		
31	Abandonment of Leases (Natural Gas)		
32	Amort of Plant Acquisition Adj		
33	Total Accum Prov (equals 14) (22,26,30,31,32)	821,970,172	821,970,172

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
Gulf Power Company	(1) [X] An Original (2) [ ] A Resubmission	04/30/2000	Dec. 31, 1999

ELECTRIC PLANT IN SERVICE (Account 101, 102, 103 and 106) (Continued)

Line No.	Account (a)	Balance Beginning of Year (b)	Additions (c)
40	(346) Misc. Power Plant Equipment	[redacted]	[redacted]
41	TOTAL Other Prod. Plant (Enter Total of lines 34 thru 40)	[redacted]	[redacted]
42	TOTAL Prod. Plant (Enter Total of lines 15, 23, 32, and 41)	[redacted]	[redacted]
43	3. TRANSMISSION PLANT	[redacted]	[redacted]
44	(350) Land and Land Rights	[redacted]	[redacted]
45	(352) Structures and Improvements	[redacted]	[redacted]
46	(353) Station Equipment	[redacted]	[redacted]
47	(354) Towers and Fixtures	[redacted]	[redacted]
48	(355) Poles and Fixtures	[redacted]	[redacted]
49	(356) Overhead Conductors and Devices	[redacted]	[redacted]
50	(357) Underground Conduit	[redacted]	[redacted]
51	(358) Underground Conductors and Devices	[redacted]	[redacted]
52	(359) Roads and Trails	[redacted]	[redacted]
53	TOTAL Transmission Plant (Enter Total of lines 44 thru 52)	[redacted]	[redacted]
54	4. DISTRIBUTION PLANT	[redacted]	[redacted]
55	(360) Land and Land Rights	[redacted]	[redacted]
56	(361) Structures and Improvements	[redacted]	[redacted]
57	(362) Station Equipment	[redacted]	[redacted]
58	(363) Storage Battery Equipment	[redacted]	[redacted]
59	(364) Poles, Towers, and Fixtures	[redacted]	[redacted]
60	(365) Overhead Conductors and Devices	[redacted]	[redacted]
61	(366) Underground Conduit	[redacted]	[redacted]
62	(367) Underground Conductors and Devices	[redacted]	[redacted]
63	(368) Line Transformers	[redacted]	[redacted]
64	(369) Services	[redacted]	[redacted]
65	(370) Meters	[redacted]	[redacted]
66	(371) Installations on Customer Premises	[redacted]	[redacted]
67	(372) Leased Property on Customer Premises	[redacted]	[redacted]
68	(373) Street Lighting and Signal Systems	[redacted]	[redacted]
69	TOTAL Distribution Plant (Enter Total of lines 55 thru 68)	[redacted]	[redacted]
70	5. GENERAL PLANT	[redacted]	[redacted]
71	(389) Land and Land Rights	[redacted]	[redacted]
72	(390) Structures and Improvements	[redacted]	[redacted]
73	(391) Office Furniture and Equipment	[redacted]	[redacted]
74	(392) Transportation Equipment	[redacted]	[redacted]
75	(393) Stores Equipment	[redacted]	[redacted]
76	(394) Tools, Shop and Garage Equipment	[redacted]	[redacted]
77	(395) Laboratory Equipment	[redacted]	[redacted]
78	(396) Power Operated Equipment	[redacted]	[redacted]
79	(397) Communication Equipment	[redacted]	[redacted]
80	(398) Miscellaneous Equipment	[redacted]	[redacted]
81	SUBTOTAL (Enter Total of lines 71 thru 80)	[redacted]	[redacted]
82	(399) Other Tangible Property	[redacted]	[redacted]
83	TOTAL General Plant (Enter Total of lines 81 and 82)	[redacted]	[redacted]
84	TOTAL (Accounts 101 and 106)	[redacted]	[redacted]
85	(102) Electric Plant Purchased (See Instr. 8)	[redacted]	[redacted]
86	(Less) (102) Electric Plant Sold (See Instr. 8)	[redacted]	[redacted]
87	(103) Experimental Plant Unclassified	[redacted]	[redacted]
88	TOTAL Electric Plant in Service (Enter Total of lines 84 thru 87)	[redacted]	[redacted]

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
Gulf Power Company	(1) [X] An Original (2) [ ] A Resubmission	04/30/2000	Dec. 31, 1999

ELECTRIC PLANT IN SERVICE (Account 101, 102, 103 and 106) (Continued)

Retirements (d)	Adjustments (e)	Transfers (f)	Balance at End of Year (g)		Line No.
[redacted]					40
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Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
Gulf Power Company	(1) [X] An Original (2) [ ] A Resubmission	04/30/2000	Dec. 31, 1999

ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

If the amount for previous year is not derived from previously reported figures, explain in footnote.

Line No.	Account (a)	Amount for Current Year (b)	Amount for Previous Year (c)
104	3. DISTRIBUTION Expenses (Continued)	[redacted]	[redacted]
105	(581) Load Dispatching	[redacted]	[redacted]
106	(582) Station Expenses	[redacted]	[redacted]
107	(583) Overhead Line Expenses	[redacted]	[redacted]
108	(584) Underground Line Expenses	[redacted]	[redacted]
109	(585) Street Lighting and Signal System Expenses	[redacted]	[redacted]
110	(586) Meter Expenses	[redacted]	[redacted]
111	(587) Customer Installations Expenses	[redacted]	[redacted]
112	(588) Miscellaneous Expenses	[redacted]	[redacted]
113	(589) Rents	[redacted]	[redacted]
114	TOTAL Operation (Enter Total of lines 103 thru 113)	[redacted]	[redacted]
115	Maintenance	[redacted]	[redacted]
116	(590) Maintenance Supervision and Engineering	[redacted]	[redacted]
117	(591) Maintenance of Structures	[redacted]	[redacted]
118	(592) Maintenance of Station Equipment	[redacted]	[redacted]
119	(593) Maintenance of Overhead Lines	[redacted]	[redacted]
120	(594) Maintenance of Underground Lines	[redacted]	[redacted]
121	(595) Maintenance of Line Transformers	[redacted]	[redacted]
122	(596) Maintenance of Street Lighting and Signal Systems	[redacted]	[redacted]
123	(597) Maintenance of Meters	[redacted]	[redacted]
124	(598) Maintenance of Miscellaneous Distribution Plant	[redacted]	[redacted]
125	TOTAL Maintenance (Enter Total of lines 116 thru 124)	[redacted]	[redacted]
126	TOTAL Distribution Exp (Enter Total of lines 114 and 125)	[redacted]	[redacted]
127	4. CUSTOMER ACCOUNTS EXPENSES	[redacted]	[redacted]
128	Operation	[redacted]	[redacted]
129	(901) Supervision	[redacted]	[redacted]
130	(902) Meter Reading Expenses	[redacted]	[redacted]
131	(903) Customer Records and Collection Expenses	[redacted]	[redacted]
132	(904) Uncollectible Accounts	[redacted]	[redacted]
133	(905) Miscellaneous Customer Accounts Expenses	[redacted]	[redacted]
134	TOTAL Customer Accounts Expenses (Total of lines 129 thru 133)	[redacted]	[redacted]
135	5. CUSTOMER SERVICE AND INFORMATIONAL EXPENSES	[redacted]	[redacted]
136	Operation	[redacted]	[redacted]
137	(907) Supervision	[redacted]	[redacted]
138	(908) Customer Assistance Expenses	[redacted]	[redacted]
139	(909) Informational and Instructional Expenses	[redacted]	[redacted]
140	(910) Miscellaneous Customer Service and Informational Expenses	[redacted]	[redacted]
141	TOTAL Cust. Service and Information. Exp. (Total lines 137 thru 140)	[redacted]	[redacted]
142	6. SALES EXPENSES	[redacted]	[redacted]
143	Operation	[redacted]	[redacted]
144	(911) Supervision	[redacted]	[redacted]
145	(912) Demonstrating and Selling Expenses	[redacted]	[redacted]
146	(913) Advertising Expenses	[redacted]	[redacted]
147	(916) Miscellaneous Sales Expenses	[redacted]	[redacted]
148	TOTAL Sales Expenses (Enter Total of lines 144 thru 147)	[redacted]	[redacted]
149	7. ADMINISTRATIVE AND GENERAL EXPENSES	[redacted]	[redacted]
150	Operation	[redacted]	[redacted]
151	(920) Administrative and General Salaries	[redacted]	[redacted]
152	(921) Office Supplies and Expenses	[redacted]	[redacted]
153	(Less) (922) Administrative Expenses Transferred-Credit	[redacted]	[redacted]

PRIVILEGED INFORMATION
DO NOT RELEASE

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year of Report
Gulf Power Company	(1) [X] An Original (2) [ ] A Resubmission	04/30/2000	Dec. 31, 1999

ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

If the amount for previous year is not derived from previously reported figures, explain in footnote.

Line No.	Account (a)	Amount for Current Year (b)	Amount for Previous Year (c)
154	7. ADMINISTRATIVE AND GENERAL EXPENSES (Continued)	[redacted]	[redacted]
155	(923) Outside Services Employed	[redacted]	[redacted]
156	(924) Property Insurance	[redacted]	[redacted]
157	(925) Injuries and Damages	[redacted]	[redacted]
158	(926) Employee Pensions and Benefits	[redacted]	[redacted]
159	(927) Franchise Requirements	[redacted]	[redacted]
160	(928) Regulatory Commission Expenses	[redacted]	[redacted]
161	(929) (Less) Duplicate Charges-Cr.	[redacted]	[redacted]
162	(930.1) General Advertising Expenses	[redacted]	[redacted]
163	(930.2) Miscellaneous General Expenses	[redacted]	[redacted]
164	(931) Rents	[redacted]	[redacted]
165	TOTAL Operation (Enter Total of lines 151 thru 164)	[redacted]	[redacted]
166	Maintenance	[redacted]	[redacted]
167	(935) Maintenance of General Plant	[redacted]	[redacted]
168	TOTAL Admin & General Expenses (Total of lines 165 thru 167)	[redacted]	[redacted]
169	TOTAL Elec Op and Maint Expn (Tot 80, 100, 126, 134, 141, 148, 168)	[redacted]	[redacted]

NUMBER OF ELECTRIC DEPARTMENT EMPLOYEES

1. The data on number of employees should be reported for the payroll period ending nearest to October 31, or any payroll period ending 60 days before or after October 31.

2. If the respondent's payroll for the reporting period includes any special construction personnel, include such employes on line 3, and show the number of such special construction employees in a footnote.

3. The number of employees assignable to the electric department from joint functions of combination utilities may be determined by estimate, on the basis of employee equivalents. Show the estimated number of equivalent employees attributed to the electric department from joint functions.

1. Payroll Period Ended (Date)	[redacted]
2. Total Regular Full-Time Employees	[redacted]
3. Total Part-Time and Temporary Employees	[redacted]
4. Total Employees	[redacted]

B

GULF POWER COMPANY
STATUTORY CATV RATE
BASED ON 1999 DATA

Net Investment Per Pole (Embedded) = $\dfrac{(\text{Acct 364 - Depreciation})\ .85}{\text{Number of Poles}}$

= $\dfrac{(\text{[redacted]} - 30{,}148{,}830)\ .85}{224{,}555}$

= $183.43

1999 Rate = Net Investment Per Pole X FCC annual Fixed Charge Rate X Space Allocation

= $183.43 X .33945 X 1/13.5

= <u>$4.61</u>

GULF POWER COMPANY

Calculations Using FERC Form No. 1 Data
Utilizing FCC Methodology as described in
CC Docket No. 86-212, Order No. FCC 87-1209
As of December 31, 1999

Depr. Exp.	=	5.20% x [redacted] / [redacted]	[redacted]
Admin. Exp.	=	[redacted] / ([redacted] - [redacted])	[redacted]
Maint. Exp.	=	[redacted] / ([redacted] - [redacted])	[redacted]
Normalized Taxes	=	81,779,295 / ([redacted] - [redacted])	[redacted]
			26.189%
Net Weighted Cost of Capital			7.757%
Total			33.945%

The Florida Public Service Commission has historically included deferred income taxes in the utility's capital structure at zero cost; consequently they have been excluded from the above formula.

Attachment C
3rd Affidavit of Michael R. Dunn

C

GULF POWER COMPANY
FCC TELECOM RATE
BASED ON 1999 DATA

Assume 13.5 feet of usable space and an average of 1.64 communication attachments per pole (based on the weighted average number of attachments on poles where CATV and Telecom companies are attached). Also, assume utilization of a 37.5' pole and 1 foot of usable space for the communication company.

Net Investment Per Pole = $\dfrac{\text{(Acct 364 - Depreciation) .85}}{\text{Number of Poles}}$ = ([redacted] - 30,148,830) .85 / [redacted]24,555

= $183.43

Usable Space Cost Per Pole = Net Investment Per Pole X $\dfrac{\text{(Usable Space)}}{\text{Pole Height}}$ X Annual Fixed Charge Rate X Space Allocation

= $183.43 (13.5/37.5) X .33945 X (1/13.5) = $1.66

Unusable Space Cost Per Pole = Net Investment Per Pole X $\dfrac{\text{(Unusable Space)}}{\text{Pole Height}}$ X Annual Fixed Charge Rate X Space Allocation

= $183.43 (24/37.5) X .33945 X 2/3 (1/1.64) = $16.20

1999 Rate = $1.66 + $16.20 = $17.86

FCCRate.Doc
08/02/00

GULF POWER COMPANY

Calculations Using FERC Form No. 1 Data
Utilizing FCC Methodology as described in
CC Docket No. 86-212, Order No. FCC 87-1209
As of December 31, 1999

Depr. Exp.	=	5.20% x [redacted] / [redacted]		[redacted]
Admin. Exp.	=	[redacted] / ([redacted] - [redacted])		[redacted]
Maint. Exp.	=	[redacted] / ([redacted] - [redacted])		[redacted]
Normalized Taxes	=	81,779,295 / ([redacted] - [redacted])		[redacted]
				26.189%
Net Weighted Cost of Capital				7.757%
Total				33.945%

The Florida Public Service Commission has historically included deferred income taxes in the utility's capital structure at zero cost; consequently they have been excluded from the above formula.

Replacement Cost for Pole Attachments
(Based on 1999 Data)

Gulf Power Company
Pole Attachment Fee Calculation

Description		$/Pole	
Replacement Cost of 40' Pole		**$467.84**	
Carrying Charge Rate			
O&M Expense	[redacted]%		$[redacted]
Other Taxes	[redacted]%		$[redacted]
Administrative and General Expense	[redacted]%		$[redacted]
Depreciation Expense	[redacted]%		$[redacted]
Income Taxes	[redacted]%		$[redacted]
Cost of Capital	[redacted]%		$[redacted]
Total Carrying Charge Rate and Amount per Pole	**27.585%**		**$38.06**
Fee Per Pole			
Replacement Cost of 40' Pole		$467.84	
Carrying Charge Rate		27.585%	
Total Carrying Cost Per Pole		**$129.05**	
Allocated Usage		29.49%	
Total Attachment Fee Per Pole		**$38.06**	

8/2/00

Attachment D
3rd Affidavit of Michael R. Dunn

D

Investment

Inputs:

Account #	Description	Beginning of Year Balance	End of Year Balance	Average
Plant				
	Most Recent Year Cost of 40' Pole Additions	$877,272	N/A	N/A
360	Land & Land Rights	N/A	N/A	$0
360.2	Distribution Lines - Land Rights and Other Costs	$0	$0	$0
364	Poles, Towers, & Fixtures	$[redacted]	$[redacted]	$[redacted]
365	Overhead Conductors and Devices	$[redacted]	$[redacted]	$[redacted]
	Grounding Equipment			[redacted]
	Initial Clearing			$0
367	Underground Conductors and Devices			$0
368	Line Transformers	$[redacted]	$[redacted]	$[redacted]
	Arrestors			[redacted]
360-373	Total Distribution Plant Investment	$[redacted]	$[redacted]	$[redacted]
389-398	Total General Plant Investment	$[redacted]	$[redacted]	$[redacted]
101 & 106	Gross Electric Plant Investment	$[redacted]	$[redacted]	$[redacted]
108	Total Electric Plant Accumulated Depreciation			[redacted]
	Work Order Estimating System for:			
	Arrestors & Brackets(Material and Labor)		N/A	
	Ground Rods, Welds, Connectors, & Wire (Mat. & Lbr)		N/A	
Total # of Account 364 Distribution Poles		67,005		
Allocation of grd. & arrestors per pole		# 19.05%		7/28/00

Calculation:

Description	Amount	Directly Identified or Allocated For Pole Attachment	# of Poles	$/Pole
Most Recent 40 ft Pole Replacement Cost	$877,272	$877,272	2,226	$394.10
Account 360-For Land/Land Rights for Mass Prop.	$0	0	67,005	$0.00
Account 365-Overhead Conductors & Devices	$[redacted]	100.00%		
Account 367-Undergoeund Conductors & Devices	[redacted]	0.00%		
Total Conductors & Devices	$[redacted]	100.00%		
Account 365-Overhead Conductors & Devices	$[redacted]			
Amount Allocated for Initial Clearing	[redacted]	0	67,005	$0.00
Replacement cost of grd. & arrestors per pole	$238.00	19.05%		$45.33
Total Distribution Investment For Pole Attachment				**$439.43**
Gross Electric Plant Investment	$[redacted]			
Acct. 389-398 General Plant	[redacted]			
Gross Electric Plant Less General Plant	$[redacted]	[redacted]%		28.41
Total Investment For Pole Attachment				**$467.84**

Assumptions:

1. Use the most recent year cost and quantity of 40' pole additions to calculate the estimated replacement cost.
2. Use actual amount of land and land rights capitalized for distribution lines to the extent those costs are not already allocated to account 364.
3. Use actual grounding equipment investment, current job estimating calculations, or 12% of account 365 if actual unknown.
4. Use actual arrestors equipment investment, current job estimating calculations, or 6% of account 368 if unknown.
5. Use average investment balances for account 360, 364, 365 and 368 instead of current year additions divided by the investment balance of the quantity of poles to reduce the volatility from year to year for these type investments.
6. General Plant Investment is allocated to 40' poles based on the ratio of current year additions of 40' poles to Gross Electric Plant

7/28/00

Carrying Charge Rates for Expenses

Inputs:

Account #	Description	Balance
	Depreciation Rate	3.93%
Expenses		
580	Distribution - Operation Supervision & Engineering	$[redacted]
583	Overhead Line Expenses	$[redacted]
588	Miscellaneous Distribution Expenses	$[redacted]
590	Distribution - Maintenance Super. & Eng.	$[redacted]
593	Distribution - Maintenance of Overhead Lines	$[redacted]
598	Miscellaneous Distribution Expenses	$[redacted]
920-935	Total Administrative & General	$[redacted]
Taxes		
408.1	Taxes Other Than Income Taxes	$51,781,606
	Accum. Def. Taxes - Electric	

Calculation:

Operation and Maintenance Expense

Account	Description	Amount	Investment	Carrying Charge
	Total Distr. - O&M of OH Lines to Allocate	[redacted]	$[redacted]	[redacted]% ✓
	Other Distr. O&M Amount to Allocate		$[redacted]	% ✓
	Total O&M Carrying Charge			% ✓

To Allocate on Distr. Line Plant Investment			Allocation Base:	
583	Distribution - Oper. of Overhead Lines	$[redacted]	Acct. 364 Distr.. Plt. Invest.	$[redacted]
593	Distribution - Maint. Of Overhead Lines	$	Acct. 365 Distr.. Plt. Invest.	$
	Total Distr. - O&M of OH Lines to Allocate	$	Acct. 368 Distr.. Plt. Invest.	$
			Gross Distr. Plant for Alloc.	$

To Allocate on Total Distribution Plant Investment:			Allocation Base:	
580	Distr. - Oper. Eng. & Super.	[redacted]	Gross Distr. Plant Invest	$[redacted]
588	Misc'l. Distribution Oper. Expenses			
590	Distr. - Maint. Eng. & Super.			
598	Misc'l. Distribution Maint. Expenses			
	Other Distr. O&M Amount to Allocate	$		

Taxes Other Than Income Taxes

Account	Description	Amount	Total Electric Gross Investment	Carrying Charge
408.1	Taxes Other Than Income Taxes	$51,781,606	$[redacted]	[redacted]% ✓

Administrative and General Expense

Account	Description	Amount	Total Electric Gross Investment	Carrying Charge
920-935	Total Administrative and General	$[redacted]	$[redacted]	[redacted]% ✓

Depreciation Expense

	Carrying Charge
Depreciation Rate	3.931%

Calculation

Component	Amount	Ratio	Cost	Weighted Cost
Long Term Debt	$1,971	45.000%	[redacted]%	[redacted]%
Trust Preferred	$438	10.000%	[redacted]%	[redacted]%
Preferred Stock	0	0.000%	0.000%	0.000%
Common Equity	1,971	45.000%	[redacted]%	[redacted]%
Accumulated Deferred Income Taxes		0.000%	0.000%	0.000%
Total Capitalization	$4,380	100.000%		[redacted]%

Composite Tax Rate	38.58%
1 minus Composite Tax Rate	61.43%
Weighted Average Cost of Preferred Stock	0.000%
Weighted Average Cost of Common Equity	[redacted]%
Total Weighted Average Cost of Preferred and Common Equity	[redacted]%
Income Tax Compotent of Cost of Capital	[redacted]%

Space Allocation

Inputs:

CATV Space (Feet)	1.00
Telecom Space (Feet)	3.00
Electric Utility Space (Feet)	7.50
Usable Space (Feet)	11.50
Total Pole Space (Feet)	40.00
Common Space to Allocate	28.50
Total no. of poles with cable attachments	N/A
Total no. of poles with telecom attachments	N/A
Total no. of poles with cable & telecom attachments	N/A
Avg. # of Attachments (no. of poles with cable attach. & no. of poles with telecom attach. divided by total no. of poles with both cable and telecom attach.)	2.64
Common Space/Average # of Attachments	10.80

Calculation:

Space Allocation	
Space occupied	1
Common Space Allocation	10.8
total space allocated	11.80
Total pole height	40
% allocated to attachee	29.49%

Pole Information - Cost

	Regulated		Unregulated		Total	
	Current Additions	Total At Year End	Current Additions	Total At Year End	Current Additions	Total At Year End
25 wood	-		-	-	-	-
30 wood			-	-	-	-
35 wood			-	-	-	-
40 wood	877,272	15,899,216	-	-	877,272	15,899,216
45 wood			-	-	-	-
50 wood			-	-	-	-
55 wood			-	-	-	-
60 wood			-	-	-	-
65 wood			-	-	-	-
70 wood			-	-	-	-
75 wood			-	-	-	-
80 wood	-		-	-	-	-
85 wood	-		-	-	-	-
90 wood	-		-	-	-	-
95 wood	-	-	-	-	-	-
100 wood	-		-	-	-	-
115 wood	-		-	-	-	-
25 steel	-	-	-	-	-	-
30 steel	-	-	-	-	-	-
35 steel	-	-	-	-	-	-
40 steel	-		-	-	-	-
45 steel	-	-	-	-	-	-
50 steel	-		-	-	-	-
55 steel	-	-	-	-	-	-
60 steel	-	-	-	-	-	-
30 concr	-	-	-	-	-	-
35 concr	-		-	-	-	-
40 concr	-	-	-	-	-	-
45 concr	-	-	-	-	-	-
50 concr	-	-	-	-	-	-
55 concr	-	-	-	-	-	-
60 concr	-	-	-	-	-	-
30 steel sc	-	-	-	-	-	-
35 steel sc	-	-	-	-	-	-
45 steel sc	-	-	-	-	-	-
55 steel sc	-	-	-	-	-	-
60 steel sc	-	-	-	-	-	-
60 steel dc	-	-	-	-	-	-
Sub Total	$ 877,272	$ 15,899,216	$ -	$ -	877,272	15,899,216
foundation	-		-	-	-	-
foundation - tower	-		-	-	-	-
fixtures	-		-	-	-	-
	$ 877,272	$ 15,899,216	$ -	$ -	877,272	15,899,216

Pole Input Data 7/28/2000 9:32 AM

Pole Information - Number of Poles 1999 Current Additions Data; 1998 Total at Year End Data

	Regulated		Unregulated		Total	
	Current Additions	Total At Year End	Current Additions	Total At Year End	Current Additions	Total At Year End
25 wood	-		-	-	-	-
30 wood			-	-	-	-
35 wood			-	-	-	-
40 wood	2,226	67,005	-	-	2,226	67,005
45 wood			-	-	-	-
50 wood			-	-	-	-
55 wood			-	-	-	-
60 wood			-	-	-	-
65 wood			-	-	-	-
70 wood			-	-	-	-
75 wood			-	-	-	-
80 wood	-		-	-	-	-
85 wood	-		-	-	-	-
90 wood	-		-	-	-	-
95 wood	-		-	-	-	-
100 wood	-		-	-	-	-
105 wood	-		-	-	-	-
25 steel	-	-	-	-	-	-
30 steel	-	-	-	-	-	-
35 steel	-	-	-	-	-	-
40 steel	-		-	-	-	-
45 steel	-	-	-	-	-	-
50 steel	-		-	-	-	-
55 steel	-	-	-	-	-	-
60 steel	-	-	-	-	-	-
30 concr	-	-	-	-	-	-
35 concr	-		-	-	-	-
40 concr	-	-	-	-	-	-
45 concr	-	-	-	-	-	-
50 concr	-	-	-	-	-	-
55 concr	-	-	-	-	-	-
60 concr	-	-	-	-	-	-
30 steel sc	-	-	-	-	-	-
35 steel sc	-	-	-	-	-	-
45 steel sc	-	-	-	-	-	-
55 steel sc	-	-	-	-	-	-
60 steel sc	-	-	-	-	-	-
60 steel dc	-	-	-	-	-	-
Sub Total	2,226	67,005	-	-	2,226	67,005
foundation	-		-	-	-	-
foundation - tower	-		-	-	-	-
fixtures	-		-	-	-	-
	2,226	67,005	-	-	2,226	67,005

Pole Information - Cost per pole

	Regulated		Unregulated		Total	
	Current Additions	Total At Year End	Current Additions	Total At Year End	Current Additions	Total At Year End
25 wood	-	-	-	-	-	-
30 wood	-	-	-	-	-	-
35 wood	-	-	-	-	-	-
40 wood	394.10	237.28	-	-	394.10	237.28
45 wood	-	-	-	-	-	-
50 wood	-	-	-	-	-	-
55 wood	-	-	-	-	-	-
60 wood	-	-	-	-	-	-
65 wood	-	-	-	-	-	-
70 wood	-	-	-	-	-	-
75 wood	-	-	-	-	-	-
80 wood	-	-	-	-	-	-
85 wood	-	-	-	-	-	-
90 wood	-	-	-	-	-	-
95 wood	-	-	-	-	-	-
100 wood	-	-	-	-	-	-
115 wood	-	-	-	-	-	-
25 steel	-	-	-	-	-	-
30 steel	-	-	-	-	-	-
35 steel	-	-	-	-	-	-
40 steel	-	-	-	-	-	-
45 steel	-	-	-	-	-	-
50 steel	-	-	-	-	-	-
55 steel	-	-	-	-	-	-
60 steel	-	-	-	-	-	-
30 concr	-	-	-	-	-	-
35 concr	-	-	-	-	-	-
40 concr	-	-	-	-	-	-
45 concr	-	-	-	-	-	-
50 concr	-	-	-	-	-	-
55 concr	-	-	-	-	-	-
60 concr	-	-	-	-	-	-
30 steel sc	-	-	-	-	-	-
35 steel sc	-	-	-	-	-	-
45 steel sc	-	-	-	-	-	-
55 steel sc	-	-	-	-	-	-
60 steel sc	-	-	-	-	-	-
60 steel dc	-	-	-	-	-	-
Sub Total	394.10	237.28	-	-	394.10	237.28

AVERAGE NUMBER OF ATTACHMENTS PER POLE

NUMBER OF COMMUNICATION ATTACHMENTS

T	TC	C	T2C	T3C	2C	3C
1816	9222	3820	1411	20	576	10
870	1597	961	3457	0	1080	0
3884	2234	689	0	0	0	0
2662	10791	12363	0	0	0	0
11644	41490	13834	0	0	0	0
20,876	71,634	31,667	4,868	20	1,656	10

WEIGHTED AVERAGE NUMBER OF COMMUNICATION ATTACHMENTS

	Number of Poles	Attach/Pole	Cumulative Sum
T	20,876	1	20,876
TC	71,634	2	143,268
C	31,667	1	31,667
T2C	4,868	3	14,604
T3C	20	4	80
2C	1,656	2	3,312
3C	10	3	30
	130,731		213,837

Weighted Average/Pole = 213,837/130,731 = 1.64 attachments (communication)

When you include Gulf Power attachments, the average number of attachments per pole is 2.64.

#ATTACHMENTS

Job Estimating & Tracking System - JETS

GULF Power Company
Distribution Working Estimate
Type Construction: OVERHEAD

Date: 04-Nov-1999 10:07 AM

HQ: MILTON OFFICE
Customer: GULF POWER CO
Address:
Town:

W.O.:
P.E.:
Job Reference: 1231099
Job Type: A-06. ESTIMATE

Map Number:
Type Customer: SYSTEM
Estimate Name: GULF POWER CO
Engineer: BROOKS, REX
Date Last Est: 04-NOV-99

Substation:
Circuit:

Job Order:

Job Description: Cost of grounding for pole attachments

Driving Instructions:

Permits/Notification(s):
Total Estimated External Charges Included Below: $ 0

Billing:	Fixed	Joint Use	Out of Ratio	Cust Contrib
	$ 0	$ 0	$ 0	$ 0

MANHOURS	Onsite	Travel	Headquarters	Total
Company	1.26	0.00	0.00	1.26
Contractor	1.53	0.00	0.00	1.53
			Total Estimated	2.79

Labor Multiplier: 1.00 Comment:

Cost Summary	Plant	Transformer	Meters	Maint	Removal	Total
Company Labor	54	0	0	0	0	54
Contract Labor	37	0	0	0	0	37
Company Matl.	92	0	0	0	0	92
Contract Matl.	0	0	0	0	0	0
Company Equip	0	0	0	0	0	0
Contract Equip	0	0	0	0	0	0
Engr Supv OH	55				0	55
Subtotal	238	0	0	0	0	238
Blanket						0
Salvage	0	0	0	0	0	0
Total	238	0	0	0	0	238
Bill to Others						0
Total Net Cost:						238

Rate Revenue Total Ratio 0.00 ROE .00
Approval & Signoffs:
Loc Cost 0 Local Ratio 0.00 Net Present Val

Cost of 1 arrester and 8 rods ground = $238

Assume 4 arresters and 4 grounds per mile (NESC requirement) and 250' spans, which would be approximately 21 poles per mile.

Cost of arresters and grounds = 4/21 x $238 = $45.33/pole

Date: 04-Nov-1999 10:07 AM

Stores Requisition
Notify Stores - Issue
B - OH CONDUCTORS & EQUIP
ALL LOCATIONS

HQ Name: MILTON OFFICE
Applicant Name: GULF POWER CO
Job Address:
Engineer Name: BROOKS, REX
Estimate Name: GULF POWER CO
Stores Notify Date:

Document #: I99308100736
W.O. #:
Account Number: - - -
Storeroom: **Analysis Code:**
Job Ref #: 1231099
Stores Start Date:

***** MAJOR/MINOR MATERIAL *****

Item	Description	Commodity	Required	Issued	O/C	U/I
1	GROUND ROD 5/8" X 10'	04-4490-5	8	____	____	EA
2	10-KV ARRESTER	09-1025-0	1	____	____	EA

Filled By ______________________ **Date** __________ **Signoff** ______________________

Ordered By ______________________ **Approved By** ______________________

Received By ______________________ **Truck/Crew** ______________________

Job Ref #:1231099
Applicant Name: GULF POWER CO
Estimate Name: GULF POWER CO
Estimate Description: COST OF GROUNDING FOR POLE ATTACHMENTS

Work Order #:
Job address:

Work Function	Special Processing	Unit Identification	Quantity	Description	Contractor Name
*** Work Location:	1.00	Description:			
		Inst Dsgn Volt Num : 12	Inst Op Volt Num : 12	Rmv Dsgn Volt Num : 12 Rmv Op Volt Num : 12	
		Energized: N	Inaccessible : N	Rock/Swamp : N ManHours : 1.26	
INSTALL	NONE	ARRESTER	1	STANDARD OVERHEAD DISTRIBUTION ARRESTER (ARRESTER ONLY)	
INSTALL	NONE	GROUND RODS, 8	1	8 DRIVEN GROUND RODS	ASPLUNDH UG

Attachment E
3rd Affidavit of Michael R. Dunn

E

GULF POWER COMPANY
1999 NEW POLE ADDITIONS
AND AVERAGE POLE HEIGHTS

Height		Number of Poles	
Wood	30	4	120
	35	2,527	88,445
	40	2,226	89,040
	45	1,113	50,085
	50	437	21,850
	55	102	5,610
	60	22	1,320
	65	11	715
Concrete	45	1	45
	50	6	300
	65	2	130
		6,451	257,660
Average Pole Height			39.94

F

Payment For Pole Attachments
July 1, 2000 through June 30, 2001

Payment Per Pole	=	Pole Investment	X	Space Allocation Factor	X	Carry Charge Rate
Payment Per Pole	=	$467.84	X	.2949	X	.27585
Payment Per Pole	=	$38.06				

Gulf Power Company Depreciation Study
Docket No. 970643
ANALYSIS RESULTS
Depreciable Property

G

Account 364 Poles, Towers and Fixtures			
Item	FPSC Approved	Est. 1997	Change
Investment	$62,965,623	$74,111,000	$11,145,377
Iowa Curve	S0	S0	
Average Service Life	32	32	0
Theoretical Reserve	$23,612,109	$29,410,467	$5,798,358
Book Reserve	$21,767,928	$25,549,000	$3,781,072
Reserve Variance	($1,844,181)	($3,861,467)	($2,017,286)
Reserve Ratio	34.57%	34.47%	
Gross Salvage	25%	25%	0%
Removal Cost	75%	85%	10%
Net Removal Cost	50%	60%	10%
Avg. Whole Life Rate	4.7%	5.0%	0.3%
AWL Expense (1997)	$3,483,217	$3,705,550	$222,333
Average Remaining Life	24.0	24.0	0.0
ARL Rate	4.8%	5.2%	0.4%
ARL Expense (1997)	$3,557,328	$3,853,772	$296,444

Our analysis continues to support the estimates of life currently in effect.

Net removal cost has been increased from 50% to 60%. (See Tab 8 - Net Removal Cost Study)

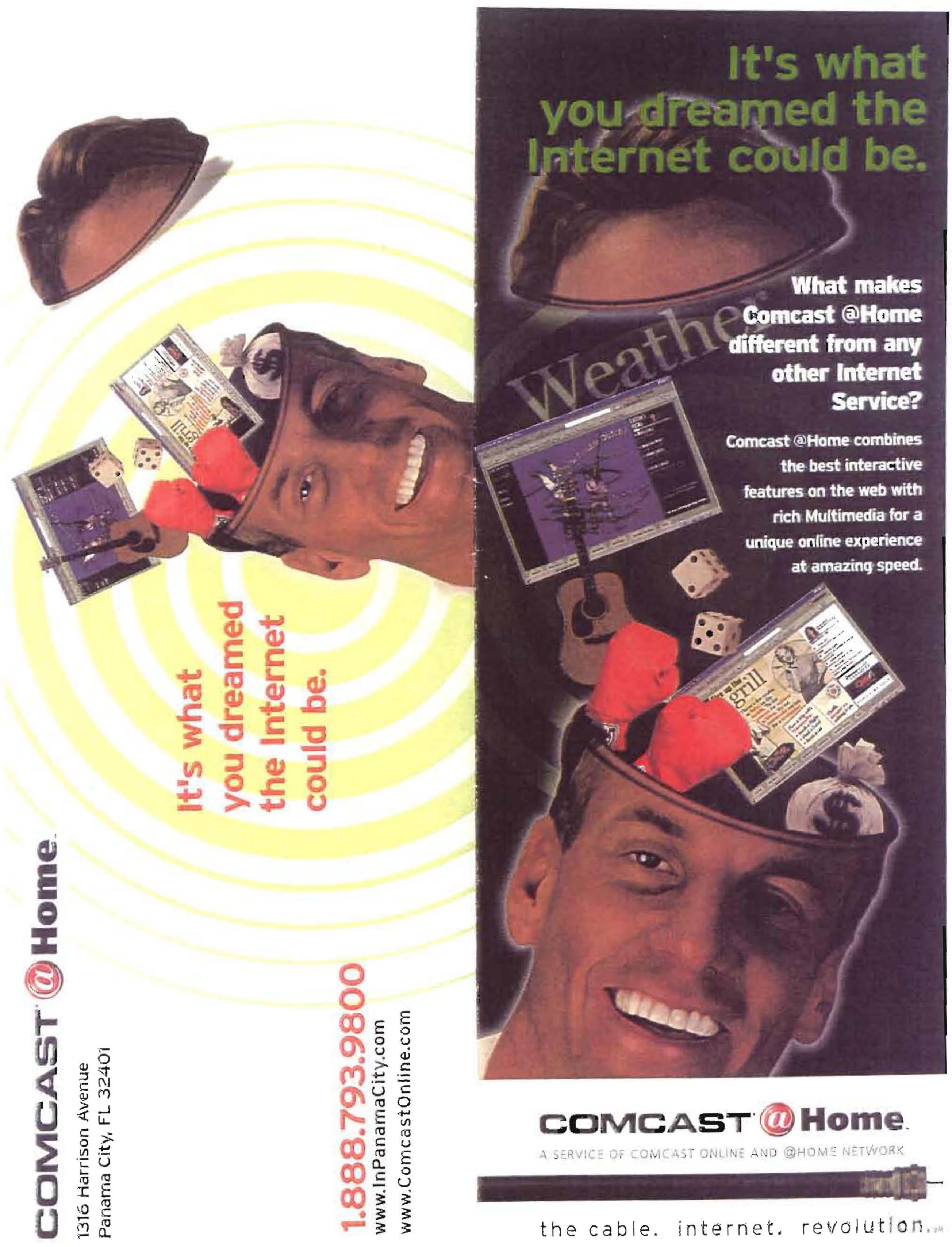
Attachment H
3rd Affidavit of Michael R. Dunn

H

Comcast Cablevision of Panama City, Inc
Billboard in Northwest Florida

Picture taken 07-28-00

23rd Street (just west of 77th Street) in Panama City, Florida



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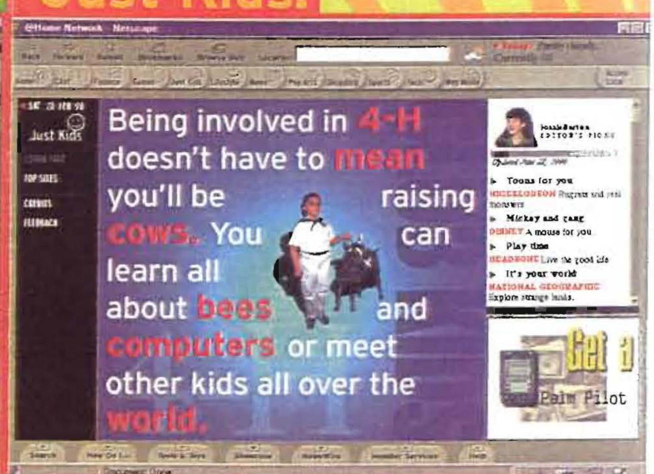

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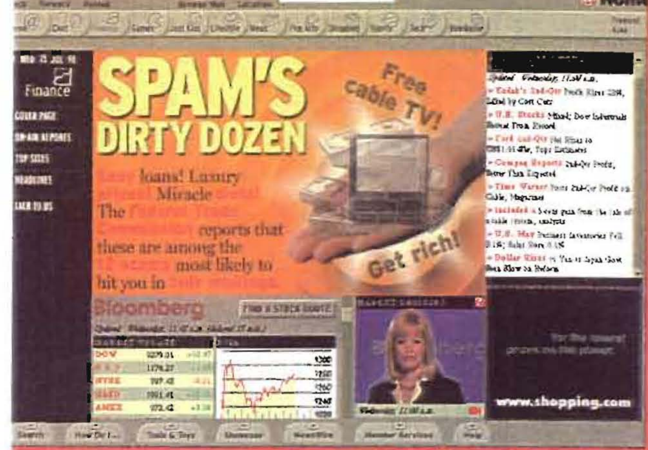

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In Your Town, our local award winning content resource for Comcast markets. Find out how t buy ads, become a content partner, or how to link to our sites.

Comcast Commercial

Comcast Commercial Online offers full-service, affordable high-speed managed broadband Internet solutions for small and medium-sized businesses as well as networked schools via Comcast Commercial Internet Service. The power of broadband cable Internet service for yo business or school is just a click away!

OnBroadband.com

OnBroadband.com will expose you to all of the broadband applications and content that you crave. Read more about it on Wired or ZDNet.

Online Schoolyard

Online Schoolyard, our education site, will provide resources from Arts to Social Sciences.

Who owns the @Home Network?
Investors in the company include Comcast Corporation, Cox Communications, Rogers Cablesystems Limited, Shaw Communications, Inc. and Tele-Communications, Inc. (TCI), and venture capital firm Kleiner Perkins Caufield & Byers . Its partnerships with Comcast, Cox, Comcast, InterMedia Partners, Marcus Cable, Rogers, Shaw and TCI provide distribution access to nearly 50% of all homes passed by cable in North America; additional affiliated cable operator agreements will further increase coverage. @Home Network's mission is to provide a high-speed, fully integrated multimedia service that revolutionizes the way people interact with information and each other at home and at work.

What is the Comcast@Home Network?
Comcast@Home is a broadband network - the next generation of interactive online service brought to your personal computer via a high speed cable modem, and existing cable infrastructure.

Comcast@Home delivers "high bandwidth" Internet access with national and local content directly to our subscribers PC using an @Home customized Netscape browser. The data transmission speed of the cable modem is hundreds of times faster than a traditional phone modem. Faster speed allows subscribers to more thoroughly enjoy multimedia content such as video and audio clips and 3-D virtual reality images. Graphics and multimedia download in seconds.

What's included in the Comcast@Home Network service?

- Rental and complete installation of a high-speed cable modem.
- Exciting, original, multimedia-rich national and local content
- Navigate the World Wide Web easily with our customized Netscape browser.
- E-mail, newsgroups and chat.
- Constant connection. No dial-up necessary.
- Unlimited Internet access.
- Customer support 24 hours a day. 7 days a week.
- Local Content

  Think globally. Surf locally. It's a small world. We're partnering with some names we know you'll recognize to bring you current news and information in an exciting, multi-media rich format.

  Enjoy **Arts, Entertainment, Sports** and **Dining**. Experience in-depth local **News** targeted to your neighborhood. Become a vocal part of your **Community.** Participate in **Education**. Improve your **Health**. Utilize a "cyberoffice" in **Business.** Stop and shop in our **Marketplace**. Look to **Real Estate** to rent, buy or sell your home. Plan a getaway in **Travel.**

  We're scanning thousands of local web sites to make sure you experience the best local Internet content in the shortest amount of time. Plan your life and have time to live it! No more World Wide Wait. Preview the local angle by visiting one of our local websites.

  Take a test drive!

- National Content
  CNN, The Weather Channel, ... names you can trust ....news, sports, weather from around the nation all brought to you at lightning speed. Near term plans also include:
  - Continuous real time stock ticker feeds
  - Instantaneous movie clips
  - Walkthrough of vacation spots
  - Customized, up-to-date scores
  - Video chats with celebrities

comcast

Comcast@Home

Area	City	ZIP	Timeframe	Status
				Available
Albuquerque	Albuquerque	87048	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87102	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87104	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87105	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87106	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87107	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87108	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87109	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87110	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87111	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87112	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87113	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87114	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87116	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87117	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87118	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87120	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87121	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87122	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87123	3Q00-4Q02	Available Soon
Albuquerque	Albuquerque	87131	3Q00-4Q02	Available Soon
Albuquerque	East Moluntain	87008	3Q00-4Q02	Available Soon
Albuquerque	East Mountain	87015	3Q00-4Q02	Available Soon
Albuquerque	East Mountain	87015	3Q00-4Q02	Available Soon

Orange County	Fullerton	92833		Available
Orange County	Fullerton	92835		Available
Orange County	Irvine	92710	1Q99	May Be Available
Orange County	Newport Beach	92625		Available
Orange County	Newport Beach	92627	2000	Available
Orange County	Newport Beach	92660	4Q98	Available
Orange County	Newport Beach	92661	4Q98	Available
Orange County	Newport Beach	92662	4Q98	Available
Orange County	Newport Beach	92663	4Q98	Available
Orange County	Placentia	92870		Available
Orange County	Santa Ana	92701	1Q99	Available
Orange County	Santa Ana	92703	1Q99	Available
Orange County	Santa Ana	92704	1Q99	Available
Orange County	Santa Ana	92705	1Q99	Available
Orange County	Santa Ana	92706	1Q99	Available
Orange County	Santa Ana	92707	1Q99	Available
Orange County	Santa Ana	92718	1Q99	Available
Orange County	Seal Beach	90740		Available
Orange County	Seal Beach	90742		Available
Orange County	Seal Beach	90743		Available
Panama City	Lynn Haven	32444	4Q99	Available
Panama City	Panama City	32401	4Q99	Available
Panama City	Panama City	32404	4Q00	Available
Panama City	Panama City	32405	4Q99	Available
Panama City	Panama City	32407	1Q00	Available Soon
Panama City	Panama City	32409	4Q99	Available
Panama City	Panama City Beach	32408	4Q00	Available Soon
Panama City	Panama City Beach	32413	1Q00	Available Soon
Panama City	Youngstown	32466	4Q99	Available
Philadelphia	Abington	19001	8/97	Available
Philadelphia	Ambler	19002	Not Available Now	Not Available Now
Philadelphia	Annville	17103	Could Be Available	Could Be Available
Philadelphia	Arcola	19420	Not Available Now	Not Available Now
Philadelphia	Arden	19073	Could Be Available	Could Be Available
Philadelphia	Ardmore	19003	12/97	Available
Philadelphia	Aston	19014	Could Be Available	Not Available Now

comcast

About Us | InYourTown | Online Schoolyard

enter y

check services covered in your area ▸

Comcast@Home
Availability
Circuit City Sites
Demo Sites
Frequently Asked Questions
Friend Get A Friend
Testimonials

comcast

Comcast@Home

The 32401 ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

Comcast@Home
Availability
Circuit City Sites
Demo Sites
Frequently Asked Questions
Friend Get A Friend
Testimonials

comcast

Comcast@Home

The 32404 ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

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Comcast@Home

The **32405** ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

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Comcast@Home

The **32407** ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

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Comcast@Home

The **32408** ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

Comcast@Home
Availability
Circuit City Sites
Demo Sites
Frequently Asked Questions
Friend Get A Friend
Testimonials

comcast

Comcast@Home

The **32409** ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

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Comcast@Home

The 32413 ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

comcast.

enter y

check services covered in your area ▶

comcast

Comcast@Home

The **32444** ZIP code is in the Comcast @Home service area and available for service!

Please sign up for the service using our online ordering form
or
if you prefer you may request more information.

Comcast @Home comes with a 30-day money back guarantee (no questions asked), so you having nothing to lose. Why not order now?

If you prefer, please call **1-800-850-5357**.

Attachment I
3rd Affidavit of Michael R. Dunn

I

Mediacom Southeast, LLC
Billboard in Gulf Breeze, Florida

Picture taken 07-26-00
4435 Gulf Breeze Parkway in Gulf Breeze, Florida

January, 2000

Dear Valued Customer:

We hope you have been enjoying your service from Mediacom. Our commitment to the community remains our top priority as we continually seek ways to enhance the quality and variety of your cable service. In addition, over the past year we focused on improved service with our On-Time Guarantee. Now it's time for more good news from Mediacom.

We are excited to let you know the following Spectrum Tier services are now available on your Family Cable on or about April 1st:

Sci-Fi (62) • The History Channel (64)
Comedy Central (65)

Because of these changes,
CourtTV will no longer be available.

Encore will now be available as an a la carte service for $1.50 per month.

A new channel lineup card is included in this brochure for your convenience.

These changes are just the beginning of an exciting year for Mediacom customers. We have introduced new technologies such as digital cable featuring an interactive program guide and dozens of new channels. High-speed internet access is also available in your area. Try our super fast cable modems today.

While rate adjustments are never popular, an adjustment is necessary at this time. Costs associated with maintaining and upgrading the cable system are on the rise. In addition, programming costs continue to increase. This rate adjustment will take effect with your April statement. We will continue to work to insure Mediacom remains the best entertainment and informational value available.

Thank you for the opportunity to serve you. If you have any questions, please call our Customer Service Department at 1-800-239-8411.

Sincerely,

Dale Ordoyne

Vice President Southeast Region

Your Community. Your World.

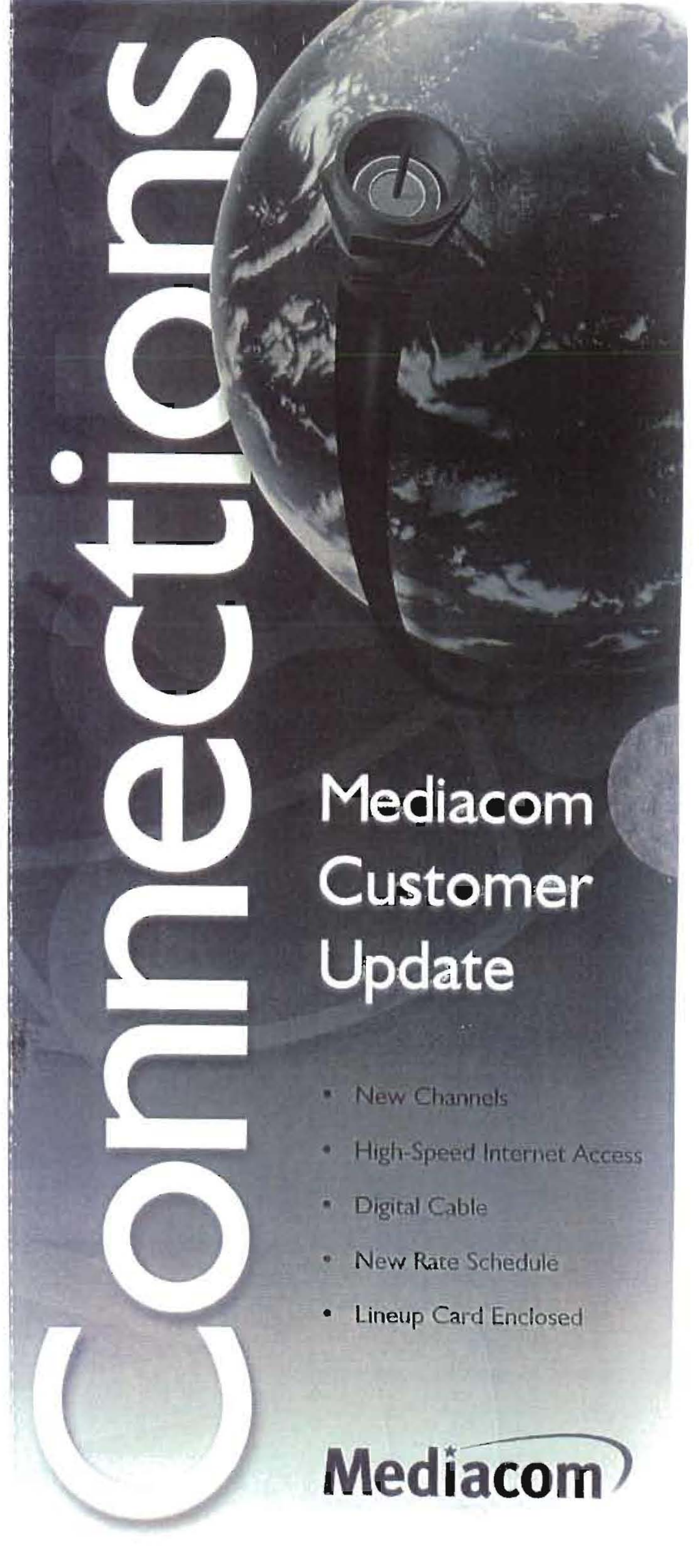
PRESORTED
FIRST CLASS MAIL
U.S. POSTAGE
PAID
PERMIT #447
DAYTONA BEACH
FLORIDA

MICHAEL DUNN
120 HIBISCUS AVE
GULF BREEZE FL 32561-4522

Mediacom
4435 Gulf Breeze Parkway, Gulf Breeze, FL 32561

Important Customer Service Information
Notification of Rate Adjustment

Gulf Breeze



Gulf Breeze Channel Lineup

Effective 4/1/2000

02	WPAN	B
03	ABC-WEAR	B
04	WHBR	B
05	CBS-WKRG	B
06	WFGX	B
07	TBS	B
08	PBS-WSRE	B
09	WMPV	B
10	FOX-WALA	B
11	NBC-WPMI	B
12	WGN Chicago	B
13	WJTC	B
14	The Movie Channel	P
15	Showtime	P
16	Cinemax	P
17	HBO	P
18	American Movie Classics	
19	Disney - ***Now on Family Cable!***	
20	Fox Family Channel	
21	FLIX	P
22	CNBC	
23	USA Network	
24	ESPN 2	
25	Lifetime	
26	ESPN	
27	Gulf Coast Network	
28	The Weather Channel	
29	Headline News	
30	Nickelodeon	
31	The Nashville Network	
32	CNN	
33	Discovery Channel	
34	The Learning Channel	
35	Turner Network Television	
36	A & E	
37	Sunshine Network	
38	BLAB	
39	Home Shopping Network	

40	C-SPAN	
41	VH-1	
42	MTV	
43	Country Music Television	
44	BET	
45	Bravo	
46	Travel Channel	
47	Food Network	
48	E!	
49	QVC	
50	America's Health Network	
51	TV Guide	
52	C-SPAN 2	
53	Fox News Channel	
54	The Golf Channel	
55	iN DEMAND 1	ID
56	iN DEMAND 2	ID
57	iN DEMAND 4	ID
58	Speedvision	
60	Action 6a-10p / Spice 10p-6a	PPV
61	Encore	P
62	Sci-Fi - *Now on Family Cable!*	
64	The History Channel - *Now on Family Cable!*	
65	Comedy Central - *Now on Family Cable!*	
66	Cartoon Network	
68	TV Land	
69	Animal Planet	
70	Outdoor Channel	
71	Romance Classics	
74	EWTN	
75	HBO Plus	P
76	Showtime 2	P
77	HGTV	

B = Broadcast Basic
P = Premium Channels
ID = iN DEMAND PPV
PPV = Adult PPV

Channel Lineups are subject to change

Mediacom

Mediacom Rate Schedule

Installation Charges

New Installation	$45.00
Whole House Installation 3 outlets	$75.00
Reconnect	$45.00
Transfer	$40.00
Premium Service Upgrade	$25.00
Additional Outlet (Same Trip)	$20.00
Additional Outlet (Separate Trip)	$25.00

Cable Service

Family Cable*	$33.95
Converter	$2.12
Remote	$.38
Broadcast Basic	$6.94

*Includes Broadcast Basic

Premium Channels

HBO	$10.45
Cinemax	$10.45
Showtime	$10.45
The Movie Channel	$10.45
FLIX	$2.95
Encore	$1.50
PPV Movies	$3.95

Premium Packages

Rainbow Package $47.95
Includes: Family Cable, HBO, Showtime, Showtime 2 & FLIX

Rainbow Gold Package $54.95
Includes: Family Cable, HBO, HBO Plus, Showtime, Showtime 2 Cinemax, FLIX & The Movie Channel

Digital One $59.95
Includes Rainbow Gold plus over 100 additional channels

Total Digital $69.95
Includes Digital One plus 4 Channels of STARZ! and 2 Channels of Encore

Customer Service

Phone .... (800) 239-8411

Rates and Channel Lineup are subject to change without notice

Billing Policies

Services are billed one month in advance. Payments are due by the tenth day after the "bill from" date. All accounts not paid by the due date may be assessed up to a $5.00 late payment processing fee on the next statement. The customer's continued acceptance of service will be deemed an agreement to pay in accordance with this schedule of rates and charges. A $25 handling fee will be charged to accounts for any check returned for insufficient funds. Upon disconnection, all equipment not returned will be charged at its estimated replacement value, plus any applicable collection fees.

Taxes and Fees

The new rate schedule in this brochure does not include franchise fees and FCC fees

Customer Privacy Rights

The Federal Cable Communications Policy Act of 1984 contains certain provisions regarding the collection and disbursement of personally identifiable information by cable television operators. In accordance with those provisions, this cable system collects and maintains personally identifiable information concerning customers. That information includes, among other things, your name, address, phone number, billing records, service maintenance and repair records, premium service subscription information, marketing information and customer complaints.

Personally identifiable information is generally used for the normal business purpose of offering and rendering cable television service and other services to you. Some persons have access to such information when necessary in connection with our business or when Mediacom otherwise deems desirable. Access may be on a day-to-day basis. Those people who have access include cable system employees; cable system sales agents; businesses which provide services to the cable system, such as our accountants, billing and collection services, program and program guide providers where applicable; program services which will periodically audit subscription information and other businesses that seek to use your name, address, etc. The cable system will not maintain such information after it is no longer necessary for carrying on our business.

As a customer, you may review any personal information held by us which pertains to you if you give us a reasonable period of time to locate and, if necessary, prepare the information for review. Preparation is sometimes necessary to avoid disclosure of information relating to other customers. If you wish to review your personal information, please contact us by letter or telephone to arrange for a review. The review will be at our local system business office. You may request correction of any errors in personal information which we collect and maintain pertaining to you.

Federal law prohibits Mediacom from collecting any personally identifiable information other than information necessary to carry on our business or to detect theft of service, unless you consent.

To the extent that we are permitted to collect personally identifiable information, we are permitted to disclose such information only to the extent necessary to conduct our business. In addition, the law allows us to disclose your name and address for non-cable service related mailing lists or other purposes unless you tell us you do not wish us to disclose it. However, such disclosures of names and addresses may not be in a form that discloses the extent of type or any use you make of services we provide, nor may it disclose the nature of any transaction you make over the cable system. If you do not wish to have your name and address disclosed even in limited situations described above, or if you wish to limit the circumstances in which we will disclose it, please obtain, fill out and return a "Nondisclosure of Name and Address Form" from our local business office.

Except as indicated in the preceding paragraph, we may not disclose personally identifiable information without your consent, unless we are required to do so by court order. If we are served with a court order requiring disclosure of personally identifiable information concerning a customer, we will inform the customer before any information is released. Under some circumstances, a governmental entity may seek a court order to obtain personally identifiable information from the cable system concerning a cable customer. The customer must be given an opportunity to consent to issuance of such an order.

Any person aggrieved by an act of a cable operator in violation of these federal limitations on the collection and disclosure of personally identifiable information may bring a civil action in a United States District Court to enforce the limitations.

THE FEATURES OF YOUR INTERNET CABLE CONNECTION

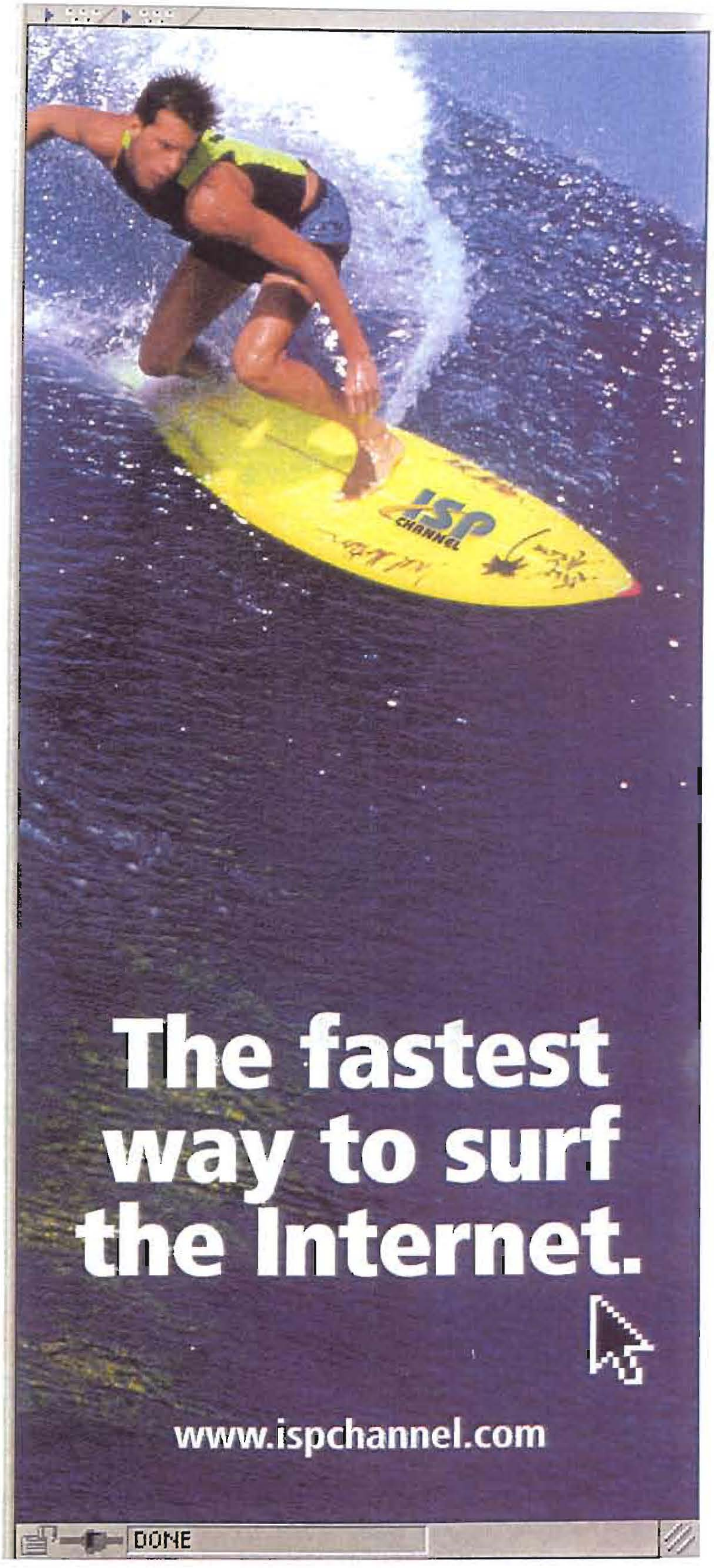
It's fast!	Send and receive large files in a flash. No waiting.
It's always on!	Instant access to the Internet and email. No dialing. No busy signal.
Affordable	One low monthly fee.
Onsite installation	We will get you up and running in no time. It doesn't get any easier than that.
24 hr., 7 day a week technical support	When you have questions, we'll be there with answers. Toll Free.
Email	3 email addresses.
Customizable homepage	Personalized so you can easily get all the news and information you want, when you want it.
Personal web site	You'll have space to build your own personal web site.

Mediacom

1-800-239-8411

ISP CHANNEL

www.ispchannel.com

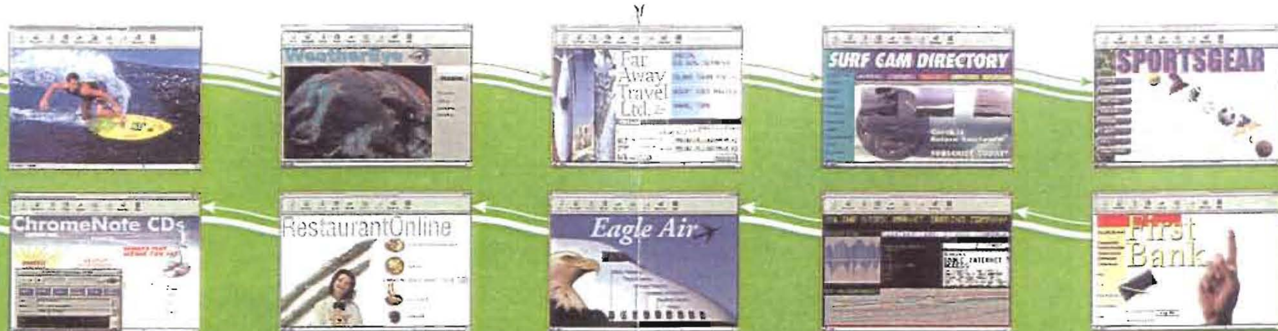


With a 56K modem

you wait a lot.

With ISP Channel and a cable modem you can surf from site to site up to **10 times faster.**

Introducing ISP Channel. The fastest way to surf the Internet.



With ISP Channel you'll be more productive while on the Internet. You'll be able to download large graphics in a flash, enjoy CD quality music, view streaming video, buy and sell stocks, make travel reservations and go shopping on the Internet.

ISP Channel. It's your high speed connection to the Internet right through your TV cable. Now there's no more waiting as you surf your favorite sites.

ISP CHANNEL IS ALWAYS CONNECTED TO THE INTERNET

With the "always on" feature of cable there is no dialing, no waiting, no busy signals, no redialing. In fact, there is no extra phone line needed. And because you are "always on" the Internet with your TV cable, your phone service isn't interrupted while you are on-line. You'll be a lot more productive and a lot less frustrated.

FASTER ACCESS MEANS BETTER VALUE

With ISP Channel you receive Internet access up to 10 times faster than the fastest phone modem you can buy. ISP Channel's faster access makes it the best value when compared to other providers.

EXPLORE A WHOLE NEW WORLD

Get the full Internet experience with ISP Channel. There is a lot to see and do on the Internet and it's only limited by your imagination. With your cable modem you'll be able to download large graphics in a flash, enjoy CD quality audio music and radio, view streaming video, buy and sell stocks and go shopping on the Internet. ISP Channel and your cable modem will open up a whole new world...the world wide web without the world wide wait.

MORE THAN JUST SPEED

Along with your high speed connection, you also get a customizable homepage so your favorite web sites are right at your finger tips. And you get 3 email accounts so your family can send and receive email from friends and business associates. It's quick and it's easy. No need for stamps, envelopes or waiting for the mail carrier.

GETTING UP AND RUNNING IS EASY

We take care of everything for you. Providing everything from installing your modem to installing your free browser. And it doesn't stop there. ISP Channel provides 24 hour, 7 day a week technical support.

So what are you waiting for? Call today and catch the next great wave.

ISP CHANNEL

www.ispchannel.com

ISP Channel service subject to availability. Additional cable connection/service fees and taxes may apply. Minimum computer requirements and other restrictions may apply. 8ROC2W

Mediacom

Products

Home

About Us

Customer Service

Press

Products
- Cable Television
- Digital Cable
- High Speed Internet Access
- Dial-Up Internet Access

Investor Relations

Site Map

Search

Cable Television

High Speed Internet Access

Digital Cable

Dial-Up Internet Access

Mediacom offers customers a wide variety of television choices to suit every taste. New services, such as digital cable and high speed Internet access are available to Mediacom customers in specific areas and more areas are being activated every month.

Mediacom

Products

- Home
- About Us
- Customer Service
- Press
- Products
  - Cable Television
  - Digital Cable
  - High Speed Internet Access
  - Dial-Up Internet Access
- Investor Relations
- Site Map
- Search

High Speed Internet Access

Mediacom ISP CHANNEL

Mediacom together with ISP Channel now brings you high speed Internet access over cable at speeds up to 10 times faster than a 56K phone modem! For as little as $29.95 a month, accessing the Internet has never been faster.

Service is currently available in some of our service areas. Other areas will be receiving this exciting new service soon.

Areas Served

- Chillicothe, IL
- Clearlake, CA
- Edenton, NC
- Eveleth, MN
- Excelsior Springs, MO
- Franklin/Sylva, NC
- Gulf Breeze, FL
- Hendersonville, NC
- Huntsville, AL
- Hutchinson, MN
- Jacksonville, IL
- Lower Delaware
- Marshall County, KY
- Mobile, AL
- Ridgecrest, CA
- Sun City, CA
- Waseca, MN

Attachment J
3rd Affidavit of Michael R. Dunn

J

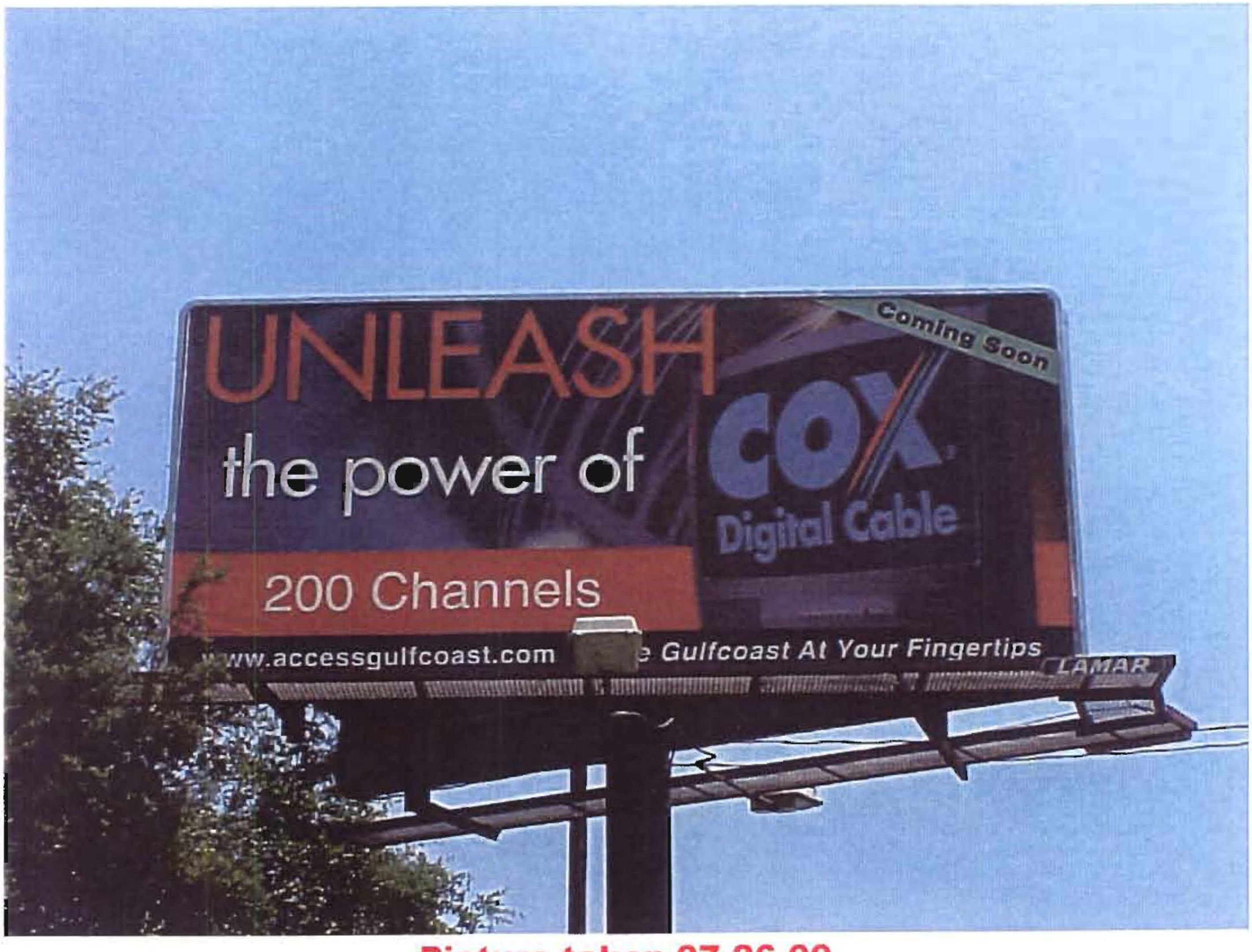
Cox Communications Gulf Coast, LLC

Billboard in Northwest Florida

Picture taken 07-26-00
Racetrack Road in Fort Walton Beach, Florida

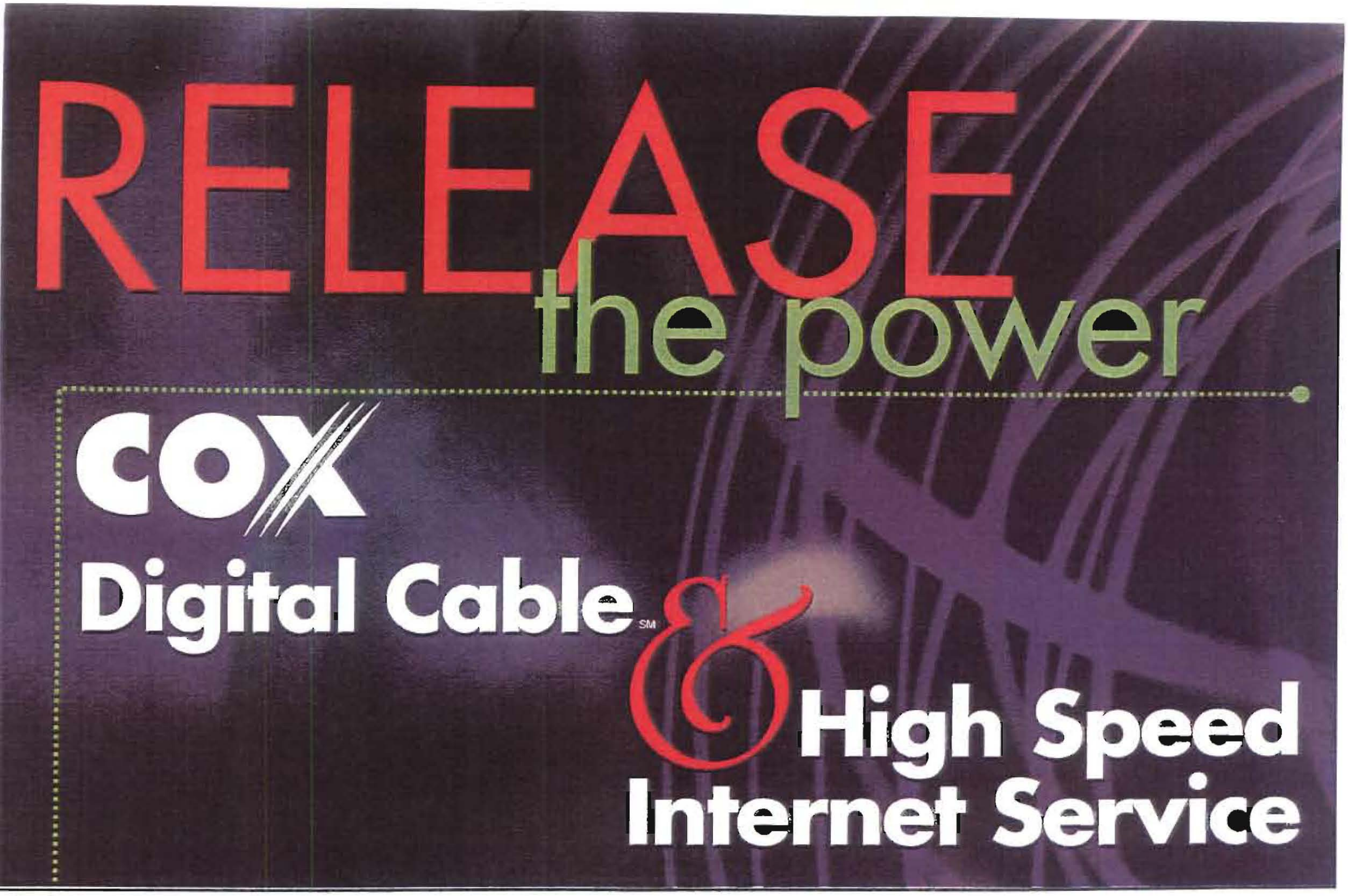
Cox Communications Gulf Coast, LLC

Billboard in Northwest Florida



Picture taken 07-26-00

South 9th Avenue in Pensacola, Florida



COX
COMMUNICATIONS

PRSRT STD
U.S. POSTAGE
PAID
PERMIT #795
PENSACOLA, FL
32501

533 ECRLOTC006
RALPH PETERSON
3975 HIDDEN OAKS DR
PENSACOLA FL 32504-8414

EXPERIENCE the power of High Spe…ed Internet Service

How Fast Is Fast?

FILE DOWNLOADING TIMES		
	28.8 Dial-Up	**Cox@Home**
1,500 KB	nearly 7 **minutes**	7 **seconds**
2 MB	over 9 **minutes**	10 **seconds**
10 MB	over 45 **minutes**	52 **seconds**

WEB PAGES PER MINUTE		
ISDN Line	**28.8 Dial-Up**	**Cox@Home**
2.25 pages	**0.5** pages	**26** pages

Number of 3,384 KB pages downloaded per minute

* Services available in upgraded areas only. Some restrictions may apply. Call Cox Cable for details.

Superfast! Imagine leaping from website to website and down-loading files in seconds instead of minutes.

Always On! With Cox@Home, you get unlimited, 24-hour Internet access. When your computer is on, so is the Internet.

No Dedicated Phone Lines! Like your cable television service, Cox@Home uses our superior digital fiber-optic network to deliver the full power of the Internet to your home computer, so you never have to pay extra for that second phone line again.

the
power of

ed Internet Service

COX @Home

Tons of Great Features! Netscape or Internet Explorer browser, email accounts, 15 MB of personal web space, chat capabilities, an @Home nternet Guide, online games and shopping, remote access option, and much, nuch more.

Immediate Information Access! Get the news when you want . View CNN video clips, movie trailers, sports highlights and get weather ipdates, traffic reports, sports scores, cinema listings, financial news and more.

Round the Clock Customer Service! Cox@Home is backed y Cox's superior customer service. We're on the phones 24 hours a day, 65 days a year to help with whatever questions you have whenever you ave them. Give us a call!

** Discount may vary dependent on equipment required.

Call Today and Get Installation for just $29.95 & Get Your First Month's Service FREE

After first month of service, regular monthly rates apply.

Offer Code #7017

PENSACOLA
478-0200

FT. WALTON
796-1269

CRESTVIEW
682-5131

Now Available In Your Area*

Your Cable Network Has Been Upgraded

Enclosed Offers Expire 10 Days After Postmark

PENSACOLA
478-0200

FT. WALTON
796-1269

CRESTVIEW
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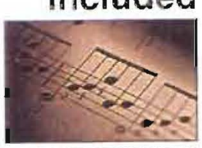

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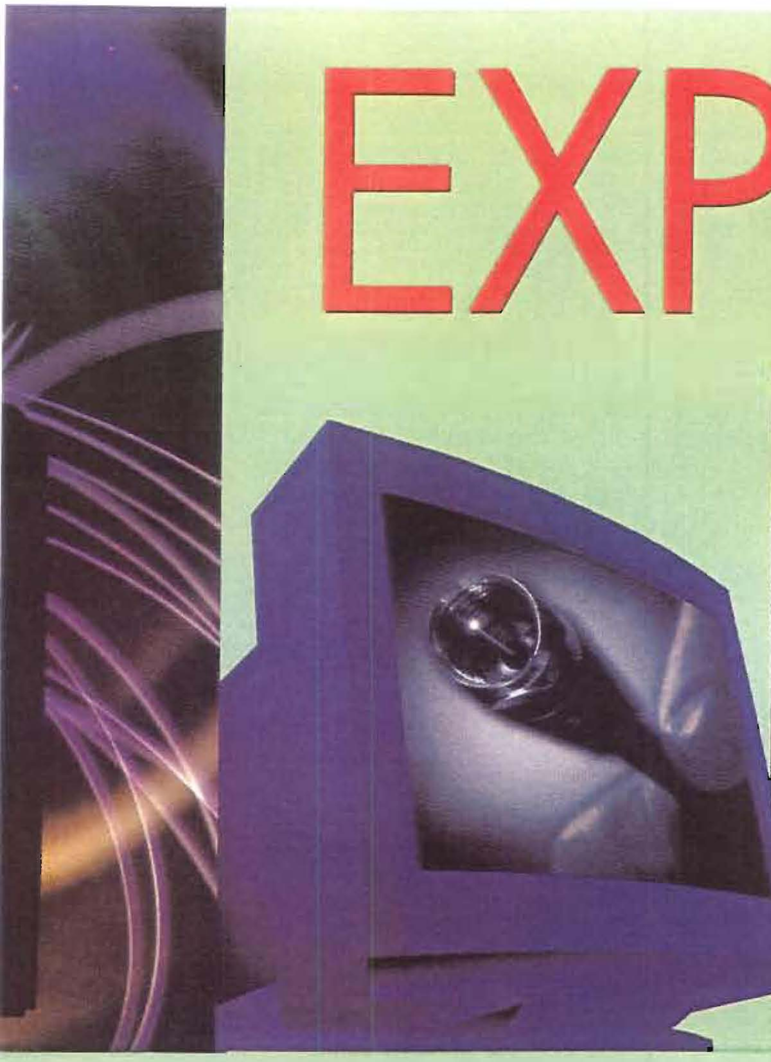

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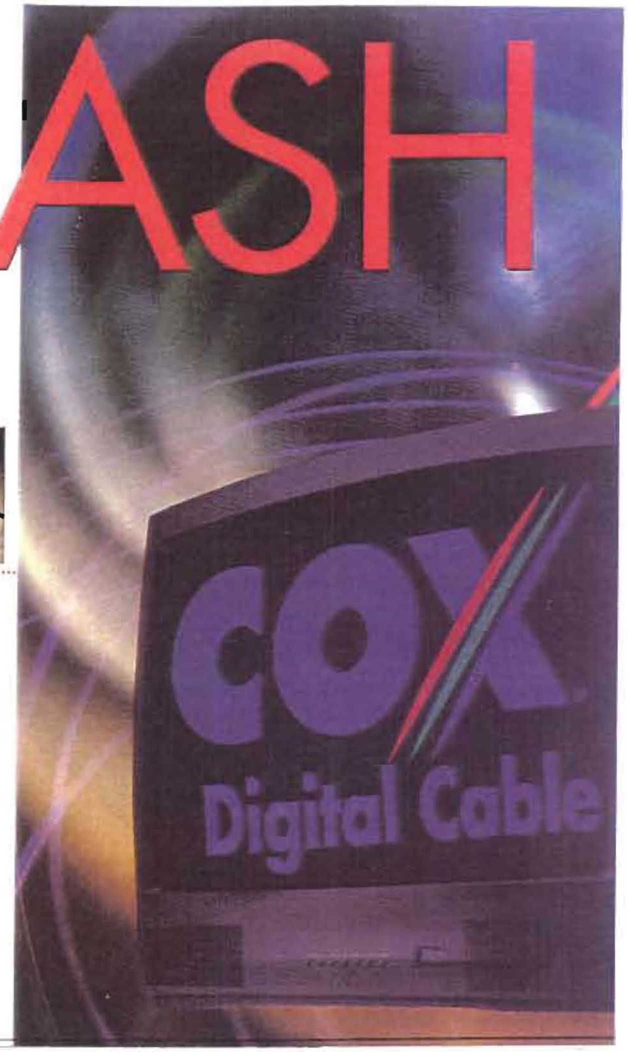

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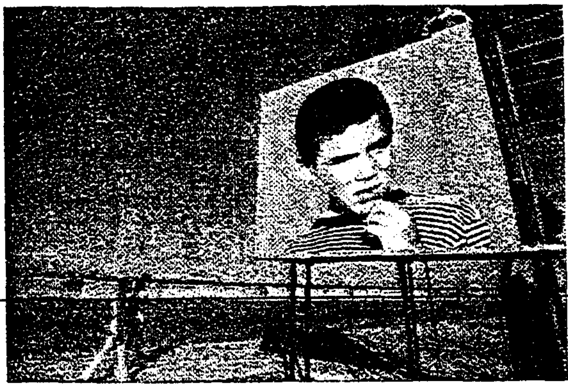

AP

Workers put up a billboard with the face of 6-year-old Cuban Elian Gonzalez in Havana, Cuba, across from the United States Interests section.

Elian's grandmothers get visas to visit U.S.

WASHINGTON (AP) — The Clinton administration has issued visas to the grandmothers of Elian Gonzalez, enabling them to come to the United States to make their case for the 6-year-old's return to Cuba, U.S. officials said Thursday.

The visas were issued as representatives of the National Council of Churches were flying to Cuba to meet with the grandmothers and with Cuban government officials. The council strongly supports the Cuban government's position that the boy should be reunited with his father on the island.

The grandmothers reportedly were given passports for travel earlier this week.

The two women were expected to travel to New York because they believe the atmosphere there will be friendlier than Miami, where there is powerful support among Cuban-Americans for allowing the boy to remain in the United States.

The visit of the grandmothers is not expected to have any impact on the legal process now under way to determine Elian's fate.

The custody fight over Elian, meanwhile, has spilled into federal court, but some legal experts doubt the gambit by the 6-year-old Cuban's Miami relatives will succeed.

Attorneys for Lazaro Gonzalez, the boy's great-uncle, went to federal court Wednesday to challenge the Immigration and Naturalization Service's ruling that Elian must to be returned to his father in Cuba.

The legal team filed a lawsuit accusing the INS of violating Elian's due-process rights and asked the judge to prevent the agency from returning the boy before it gives him an asylum hearing.

"It is about protecting Elian's civil and constitutional rights, the same as if he was any other child," said Spencer Eig, a lawyer for the great-uncle.

Many legal experts insist that Elian's U.S. relatives have no legal standing because their rights do not trump those of his father, his closest relative.

"All along, the legal issue has been who speaks for a 6-year-old boy, and the answer is the closest surviving relative," said David Abraham, an immigration law professor at the University of Miami. "That is the father."

In Washington Thursday, Attorney General Janet Reno said her department would look at any legal steps "to have the matter heard appropriately and promptly with the recognition that it does the child no good to be held in limbo."

She would not predict how soon the government would respond in court, other than to say "as soon as possible consistent with appropriate preparation."

And she held to the Immigration Service's view that the boy's Cuban father should get him back. "Law, morals, the family values that we talk about all say the bond between a parent and a child is one of the most sacred relationships there is," Reno said. "I believe that with all my heart and soul."

She repeated that "based on the information we have, I think it (the INS decision) was correct."

President Clinton also repeated his endorsement of the INS position.

"We need to think long and hard whether we're going to take the position that any person who comes to our shores who is a minor, any minor child who loses his or her parents, should never be sent home to another parent — even if that parent is capable of doing a very good job — if we don't like the government of the country where the people lived," Clinton said in an interview in Thursday's Christian Science Monitor.

He cautioned Congress not to grant the 6-year-old special citizenship to keep him in the United States and criticized the actions of Cuban President Fidel Castro. "I think the way he has attempted to politicize this is also terrible," Clinton said.

Elian has been living with his Miami relatives since he was rescued in November by the Coast Guard while clinging to an inner tube in the Atlantic off the Florida coast. His mother and stepfather were among 11 people who drowned fleeing Cuba.

The legal fate of the boy has drawn international attention and strained U.S.-Cuban relations. Congress has considered intervening and the topic has become fodder for White House candidates.

Elian's plight fuels Cuban propaganda

HAVANA (AP) — In Cuba, it's all Elian, all the time.

From the moment people turn on their radios in the morning until they switch off their televisions at night, Cubans are bombarded with news and comment about Elian Gonzalez and demands that the 6-year-old be returned from the United States.

Elian's face peers from the front page of every newspaper, hundreds of billboards and posters, hundreds of thousands of T-shirts.

Every night experts debate the boy's future for hours on live prime-time television broadcasts, often with President Fidel Castro present. Clips of those shows are repeated throughout the following day.

For the communist state's formidable propaganda machine, the boy has been a gift, the flashpoint for one of the major national crusades of recent Cuban history.

The campaign for Elian's return has prompted international news coverage and a level of organized demonstrations that Cubans say is unprecedented in the past decade — perhaps since the 1980 Mariel exile crisis led the government to rally mass support in the streets.

Dozens of times over the past six weeks, people have been given time off work to march in the streets, sometimes by the hundreds of thousands.

On Thursday, news about Elian covered almost half of the only daily newspaper in the country, Granma. Radio commentary throughout the day denounced the "mafia" holding the child in Miami.

Elian quickly became a political symbol for both sides after he was found Nov. 25 clinging to an inner tube off the Florida coast. His mother and stepfather were among 11 people who drowned in an apparent attempt to immigrate illegally to the United States. He has been staying with his relatives in Miami — including a great-uncle — since then.

On both sides the debate has sometimes been surreal.

In Miami, some have compared Elian to Winston Churchill. Others have portrayed him as a child chosen by God to remain in Florida.

In Havana on Wednesday night, the Brazilian theologian Frei Betto suggested that U.S. culture denigrates fathers and exalts uncles: He cited examples such as Uncle Sam and Donald Duck, who is accompanied by nephews rather than sons.

"The Cuban exiles have handed Cuba a win-win situation," said Nelson Valdes, a University of New Mexico sociologist who specializes in Cuba.

If Elian is returned to Cuba, it would be a victory for Castro.

"If indeed the child is not returned," it is because "the Cuban-Americans in Miami are willing to take children away from Cuban parents in Cuba," said Valdes, who was one of thousands of Cuban children sent to the United States between 1961 and 1964 to live in foster homes or orphanages under a U.S. government operation named "Peter Pan."

The issue also puts Castro in the role of defending families. "There is no other issue that could be more useful (for the Cuban government) than the defense of the family," Valdes said.

"I cannot recollect anything of this nature which has resonated with the people as this has," said Susan Eckstein, a Cuba specialist at Boston University. She said that while there have been other rallies over other issues, this was is very different because it focuses on families. "I think it's because it gets at very deep values that Cubans have."

In recent years, Cuba has suffered economic hardship and has seen a slippage of the ideological passion that charged many on the island after the 1959 revolution led by Castro.

"At a time when it is hard to get people to rally for the party, to rally for anything, this works," Eckstein said.

If you believe your future can be found in the stars, look for the "Horoscope" column in the DAILY NEWS.

Jurors see tape of graveyard shooting

FORT LAUDERDALE (AP) — The tape played in the courtroom showed a man pumping bullets into his ex-wife's body, just a few steps from their daughter's grave, as a television reporter screamed "Film it! Film it!"

The tape was played for jurors Wednesday in Broward Circuit Court, at the first-degree murder trial of Emilio Nunez, 40. His attorney suggested that the reporter heard screaming on the tape pushed the grieving father over the edge with her probing questions.

Defense attorney Reemberto Diaz said that Nunez, 40, became enraged by Cruz's graveside interview, and that's what prompted him to kill his ex-wife, Maritza Martin, when she unexpectedly showed up at the cemetery on Jan. 18, 1998.

"You know what you did to me," Nunez told Cruz as she left the courtroom with her attorney. "You used me as a pawn and you know it."

Cruz was preparing a story for the Spanish-language network Telemundo about the suicide of the couple's 15-year-old daughter, Yoandra.

Nunez blamed his 33-year-old ex-wife for causing their daughter's suicide two months earlier, saying Martin had slapped the girl after she became pregnant.

When Cruz tried to interview Martin on camera, Nunez pulled a gun, shot Martin in the head and then fired 11 more times as she lay on the ground. Cruz and her cameraman ran for cover, but not before capturing much of the shooting on tape.

Diaz said Cruz asked questions designed to get an emotional response from Nunez.

"I guess (Telemundo) got what they wanted," Diaz said.

Telemundo spokesman Ted Guefen criticized Diaz's claim.

"It is irresponsible to suggest that Telemundo or Ingrid Cruz are in any way responsible for this terrible tragedy," Guefen said. "Ingrid Cruz is a good journalist who was pursuing a story."

Cruz testified Wednesday that she was speaking to Martin when Nunez pushed her aside and shot his ex-wife. She cried as the videotape was played.

"It happened very fast," Cruz said. She no longer works for Telemundo, but the network said her departure was not related to the shooting.

Prosecutors have charged Nunez with first-degree murder, saying his repeated shots show he intended to kill his wife. Diaz is trying to show that his client acted impulsively, which would make him guilty of manslaughter.

A native of Cuba, Nunez was detained and tortured in prison there and has a history of psychiatric problems. Diaz wanted to argue he was insane when he killed his wife, but Nunez rejected that defense.

Prosecutors aren't seeking the death penalty. If convicted of first-degree murder, Nunez would receive a life sentence and be eligible for parole in 25 years.

World News

AP

Kenyan President Daniel arap Moi holds a press conference at the Nairobi State House Thursday, where he expressed Kenya's concern about continued instability in the Horn of Africa.

Kenya feels threatened by crisis nearby

By SUSAN LINNEE
Associated Press Writer

NAIROBI, Kenya — President Daniel arap Moi called a rare news conference Thursday to express Kenya's concern that instability in the Horn of Africa poses a serious threat to peace and security in the region.

"The crisis has implications well beyond the borders of the conflict areas, due to the circulation of illegal arms and refugees into neighboring countries," said the 75-year-old politician, Kenya's president since 1978.

It was not immediately clear why conflicts like the one between Ethiopia and Eritrea, which began in 1998, or the 17-year civil war in southern Sudan or the decade of lawlessness in Somalia, would occasion a news conference now.

But a diplomatic official close to Moi said later that the point of his message was to express backing for a peace plan for Somalia set forth by Djibouti President Ismael Omar Guelleh at the U.N. General Assembly last September.

The proposal, one of half a dozen floated since 1991, calls for Somali warlords to turn their factions into political parties, to disarm and to submit to the primacy of law as well as the inclusion of women and intellectuals in the process.

Djibouti, a tiny former French colony in the crook of the Horn, is the headquarters of the seven-nation Intergovernmental Authority on Development, or IGAD, under whose auspices the Guelleh plan is being discussed.

Since the ouster of Somali President Mohammed Siad Barre in 1991, neighboring Kenya has received hundreds of thousands of Somali refugees, and the flow of small arms and semiautomatic weapons into Kenya is fueling a growing tide of violent cattle rustling and armed robbery.

Moi called on the United States and Europe to do something to halt the flow of arms into the region and Africa as a whole because "they certainly do not come from Africa."

The diplomatic official said Kenya, the only country in the region that has not suffered from full scale internal strife, wanted to avoid the proliferation of peace initiatives for Somalia.

Both Ethiopia and Egypt — traditional rivals for influence in Somalia — have undertaken peace initiatives for the wishbone-shaped nation, but none has prospered. Ethiopia now backs the Guelleh plan.

Egypt, together with Libya, has offered its offices as an alternative to IGAD for both Somalia and Sudan.

"The situation in the Horn has continued to worsen. Kenya can no longer sit quietly and watch while the situation gets worse," Moi said.

Mexico's student strikers driven by despair

By MARK STEVENSON
Associated Press Writer

MEXICO CITY — They see themselves as a new generation of rebels.

They like "direct action" and collective decision-making. They oppose entrance exams, university fees and selective admissions. They sport ski masks and Cuban-style field caps.

These striking students would be just a group of 2,000 marginalized malcontents — if it weren't for the fact that they have the Mexican government backed into a corner.

The strikers control the sprawling main campus of the National Autonomous University, Latin America's largest university system. For nine months they have occupied the school, locking out 260,000 classmates.

Many are young anarchists. They identify with Mexico's student protesters of 1968, hundreds of whom were gunned down by soldiers in a massacre that continues to haunt the nation.

Largely because of memories of that massacre, the government has shied away from moving against the strikers. Unwilling to retake the campus by force, it has encouraged university authorities to capitulate to some of the strikers' demands.

But this week, the strikers may finally have stepped over the line: On Tuesday, they staged a bloody skirmish with anti-strike students, security guards and adults hired to chase strikers from a university-affiliated high school.

Thirty-seven people were injured, at least four of them critically. The strikers were seen beating apparently unconscious guards with poles and rocks and kicking their heads.

Amid the fury, the strikers show no signs of letting up. On Wednesday, they said the government had declared war on them and that they would keep striking until the university gives in to all their demands.

Their list of grievances includes widespread poverty, high unemployment and an ossified political system in which the ruling party has held power for 71 years. They feel isolated by adverse media coverage, abandoned even by most leftist professors and betrayed by the government's cuts in university funding.

The feelings of persecution have only increased their fervor.

Behind the barricades of window frames, logs and wire strikers have erected at the university gates, Miguel Abraxas, a 19-year-old student at a university-affiliated high school, vowed that "if provocateurs try to retake the university, there will be resistance."

Abraxas said that while the strikers won't allow classes to resume, "a learning process" was still going on in the university's abandoned classrooms: Striking students live, eat and sleep there and meet for marathon discussions, many of which lead to yelling and even occasional pushing and shoving. The students resist anyone who tries to cast himself as a leader of the movement, Abraxas said.

AP

Stick-wielding striking students throw stones as they retake a preparatory school affiliated with Mexico's National Autonomous University during a bloody day-long battle Tuesday in Mexico City. The strikers control the sprawling main campus of Latin America's largest university system. For nine months they have occupied the school, locking out 260,000 classmates.

AP

Journalists gather outside the house where a 37-year-old man held a schoolgirl captive for nine years in Kashiwazaki, Niigata Prefecture, 160 miles northwest of Tokyo, Saturday. Fusako Sano, now 19, vanished in November 1990 on her way back from school and never ventured outside the second story of her abductor's house until she was discovered when her abductor took her out of it for the first time since 1990.

Girl's nine-year hostage situation puzzles Japan

By JOSEPH COLEMAN
Associated Press Writer

TOKYO — It was a nightmare beyond belief: A schoolgirl grabbed off the street, stuffed into the trunk of a car and imprisoned in the second floor of her captor's house — for nine years.

The crime, which has dominated Japan's talk shows and tabloids, emerged last week when the victim was discovered after her abductor took her out of the house for the first time.

Along with disbelief at its sheer cruelty, the kidnapping is raising questions about police incompetence, the breakdown of communities and the complex relationship between captor and captive.

"She was not only confined physically," said Hiroaki Iwai, an expert in criminal sociology at Tokyo's Toyo University. "Her soul was also in chains."

Details of Fusako Sano's ordeal were still hazy this week, and police refuse to say whether there is evidence she was physically or sexually abused by the man who kidnapped her.

But the little information available has fascinated — and horrified — Japan.

On Nov. 13, 1990, Sano — then 9 years old — was grabbed off the street in Sanjo, about 180 miles northwest of Tokyo, and shut up in a second-floor bedroom in a small town 25 miles away, said Sanjo police official Bunyu Oshima.

Her unemployed captor — who has not been identified — fed her, dressed her in men's clothing and cut her hair short, police say. Media reports have said blurry, thick windows helped keep outsiders from seeing what was going on.

It's still not clear what her life was like in captivity.

The man's mother lived on the first floor and has denied knowing about Sano, police said, though newspapers say investigators now doubt that.

Police were called last week about a man making a disturbance at a hospital. When they got there, a woman with him stepped up and identified herself as Sano. Later, she was reunited with her family, who said they never lost hope that she would be found.

The kidnapping is the longest of its kind in Japan. A man who had been missing for 23 years was discovered in 1970, Iwai said, but he had been raised by his abductor as a son — not confined to a room.

Sano's kidnapper was hospitalized, apparently for emotional problems, and police say they have not questioned him. Sano also was hospitalized, and police say she is recovering.

The questions have mounted.

How, for example, could the man have eluded police detection for nine years? He was arrested in 1989 for trying to kidnap another girl and was on probation at the time of Sano's disappearance, but police apparently never investigated him.

"There was a lack of communication between local police departments," said Iwai. "If the prefectural police had taken charge, they might have been able to do something."

Japanese are also asking how the neighbors could have failed to get an inkling something was wrong, especially in a small town. For some, the crime showed how community ties have broken down in Japan.

Pakistan wrestling with nuclear policy

By AMIR ZIA
Associated Press Writer

ISLAMABAD, Pakistan — Pakistan said Thursday it has established a control system for handling its nuclear weapons program that puts the head of government — now Gen. Pervez Musharraf — in charge.

Pakistan demonstrated its nuclear capability with a series of underground explosions in May 1998 in response to similar tests by India.

Critics worry that Pakistan and India don't have clear command and control systems for handling nuclear weapons. The military has maintained control of Pakistan's weapons program, and previously the authority of civilian political leaders was not spelled out.

Pakistan's new National Command Authority will be led by the head of government and will consist of top civilian and military leaders who make decisions about deployment and use of nuclear weapons, an official announcement said. This appears to indicate the overall authority for the country's nuclear weapons program would be in the hands of a civilian ruler should democracy be restored, as Musharraf has promised.

While previously saying Pakistan will follow a policy of restraint, Musharraf — who seized power in October — also warned that his country would consider using nuclear weapons if its security was threatened by India.

"Our nuclear assets are responsibly held," Musharraf said in an interview televised Thursday evening on state-run television.

The two hostile South Asian neighbors have fought three wars since British rule of the subcontinent ended in 1947.

16th Wing wins Outstanding Unit Award

By LINDSAY TOZER
Daily News Staff Writer

HURLBURT FIELD — With two Silver Stars, one Bronze Star and 16 Distinguished Flying Crosses freshly pinned to the uniforms of Hurlburt Field airmen Friday, it seemed a natural tangent for base leaders to celebrate the 16th Special Operations Wing being recognized with the Air Force Outstanding Unit Award.

Lt. Gen. Maxwell Bailey, commander of Air Force Special Operations Command, called the 11th such honor "a true highlight to Hurlburt Field."

Since 1997, wing members have participated in eight major American military operations. Among those were: Operations Northern and Southern Watch, Joint Endeavor, Joint Guard, Indy, Desert Thunder, Desert Fox and Allied Force. The 16th SOW also earned an "excellent" rating during a spring 1998 Operational Readiness Inspection.

■ Staff Writer Lindsay Tozer can be reached at 863-1111, Ext. 435, or lindsayt@nwfdailynews.com

HEROES

From A1

In lousy weather and under mounting pressure — the crews had received word Serbian squads were combing the grounds for the flyer — the search-and-rescue team flew into the war zone on March 27.

Less than a minute was spent on the ground as the pilot was brought on-board.

Shortly after the $45 million Stealth fighter crashed northwest of Belgrade, supporters of Yugoslav President Slobodan Milosevic were televised jumping on its crumpled wing.

When the footage aired, Denehan said he already knew the pilot had been rescued.

"I was thinking they may have wreckage," he recalled. "But they don't have the pilot to put in front of the media."

Gen. Peter Schoomaker, commander-in-chief of U.S. Special Operations Command, presented the medals.

"Take pride that when America calls and lives are on the line," he told the crowd, "warriors still walk among us."

■ Staff Writer Lindsay Tozer can be reached at 863-1111, Ext. 435, or lindsayt@nwfdailynews.com

BOY

From A1

him, 'Let me see, let me see ... if it has grown.'"

Meeting host Sister Jeanne O'Laughlin and Sister Lenore Esnard, who also was in the house during the meeting, were unaware of the exchange until Quintana's remarks were broadcast on Miami television, said Barry University spokeswoman Michele Morris. O'Laughlin is president of the school.

In Cuba, few people found anything strange about Quintana's behavior, but the spokeswoman for the Spanish-language Telemundo affiliate in Miami said the station was flooded with calls from outraged viewers.

"Everyone we have talked to, everyone who saw the tape, thought this was inappropriate behavior for grandmothers," said Maria Lewis, managing editor at Telemundo's WSCV-TV.

Uva de Aragon, assistant director of the Cuban Research Institute at Florida International University, said Quintana's behavior might seem odd to people in the United States, but it was probably innocent.

"The way the woman said it on national television shows it wasn't something perverted," de Aragon said. "She was joking with a little kid, trying to get him to respond, the same as if she were tickling him or trying to see his muscles."

She said that most Hispanic cultures have a different concept of personal space and that the Cuban culture traditionally has been very male-oriented. Fathers, particularly in lower classes, often boast about the size of their sons' genitals, associating that with bravery and virility.

Elian was rescued on Thanksgiving after clinging to an inner tube for two days following a shipwreck that killed his mother.

The first-grader has been living in Miami with his great-uncle Lazaro Gonzalez, and his U.S. relatives hope to keep him despite an immigration order to send him back.

His father back in Cuba, Juan Miguel Gonzalez, is pressing for his return. He wrote Attorney General Janet Reno on Thursday asking her to move the boy to the home of another Miami relative who is more sympathetic to his wishes.

"I am deeply concerned and anguished over the present condition of my 6-year-old son, Elian Gonzalez, unfairly and cruelly separated from our family for over two months," he said in a letter released to foreign news agencies by the Cuban government.

CENSUS

From A1

dren's race.

For the first time since the federal government began counting heads in 1790, multiracial individuals and parents of mixed-race children will be able to check more than one racial category.

Kim and Mark LaRoche will identify Edouard, named for his French-Canadian grandfather, as black.

"He is multiracial, but as far as his race, we consider him to be black," Kim LaRoche said.

Marsha and Bryant Robinson, a white couple who adopted Jonathan and his 2-year-old sister Jasmin, will mark both the white and black categories.

"When you say that a person has to pick one or the other, you are saying there is something wrong with being both," Marsha Robinson said.

Bryant Robinson doesn't like either option: "I'd rather have a box that says biracial. I see them as biracial."

The change in racial identification will provide Americans with an unprecedented picture of the nation's racial diversity. Under the check-as-many-as-apply instructions, the five standard classifications — white, black, Asian, American Indian and Pacific Islander, plus other — will splinter into as many as 63 categories.

"Clearly as a country we are becoming more and more diverse. This will give us a much better sense of what that diversity looks like," said James F. Holmes, director for the Census Bureau's Atlanta region.

Add the Hispanic/Non-Hispanic question to racial classifications, and the number of categories balloons to 126.

"It is going to be a mess," said Susan Graham, president of Project RACE, a Tallahassee-based organization that lobbied for a single "multiracial" category.

The new system also has sparked conflict between multiracial advocacy groups, black organizations and other minority associations over how the change will affect federal funding, voting districts and civil-rights legislation based on racial statistics.

To make the census' racial data useful for federal and state agencies, the multiracial responses will need to be reallocated into the five traditional categories. The Census Bureau is leaving that decision up to the federal Office of Management and Budget, which hasn't decided yet. The method chosen will affect millions of dollars that flow into communities based on their racial composition.

For that reason, black organizations favor a formula that shifts all multiple-choice responses to the largest minority. People of African and Asian descent, for example, would be counted as black.

"The best method to use is one that reallocates to the larger minority group," said Hilary Shelton, director of the NAACP's Washington bureau.

Who will lose?

Asian groups fear that formula would subtract from their numbers.

"For Asian Americans, what that means is we are going to lose numbers again and the undercount will be even more problematic," said John Tateishi, executive director of the Japanese American Citizens League in San Francisco.

Asians may have more to lose because of their high rate of interracial marriage.

More than half of the Japanese in the United States married someone who is not Asian. By contrast, only 20 percent of the nation's biracial children are from black and white parents.

The issue of race is further complicated because there is no single Asian category, but rather a listing of nationalities — Chinese, Japanese, Vietnamese, Korean — which leads to confusion.

Oanh Nguyen was born in Vietnam to a Vietnamese mother and a white father. Nguyen said she would check both white and Vietnamese on her 2000 Census form. But when it comes to identifying her children, who were born in the United States, she is not sure whether to identify them as Vietnamese or American.

An attempt in 1990 to create a single Asian box was opposed by Asian-Americans who wanted detailed data about their specific subcultures, said Claudette Bennett, a Census statistician and demographer.

SEARCH

From A1

scan sonar equipment.

"He called us Tuesday to let us know he had received these orders, so we've been sort of on the lookout," said Betty, who has stayed glued to CNN since she heard.

Friday morning, she and John finally saw what they had been waiting for.

"We saw '171.' That's his ship. So we looked to see if we could see him waving at us," Betty said with a laugh.

"It's so interesting I can hardly stay away from the television."

The Popes also feel sorrow for their son as he experiences a national tragedy.

He has sent them e-mail updates on the recovery efforts' progress.

"He said they recovered both black boxes," Betty recalled. "He says, 'It surely is sad.'"

Pope lives in Destin when he's not on board the Sioux, which is at least six months each year.

"We're just looking forward to him coming home in the next month or two," his father said. "We don't get to see him much."

"We're always proud of him," his mother added.

■ Staff Writer Julie Dupuis can be reached at 863-1111, Ext. 443, or julied@nwfdailynews.com

NOISE

From A1

Pacific Ocean en route from Puerto Vallarta, Mexico, to San Francisco on Monday, killing all 88 aboard.

About 12 minutes before the end of the recording the plane apparently lost vertical control, Hammerschmidt said.

The crew recovered control in about 1½ minutes. Some time later, a flight attendant is heard telling the pilots of a loud noise from the rear of the jet.

"The crew acknowledged that they had heard it too," Hammerschmidt said.

A second noise, which was actually recorded by the device, then sounded just near the end of the tape.

"Slightly more than one minute before the end of the recording, a loud noise can be heard on the recording and the airplane appears to go out of control," he said.

The plane has an audible alarm to indicate a stall, or dangerous loss of lift. No such warning is heard on the tape, Hammerschmidt said.

He said the investigation was progressing rapidly, including work by a Navy vessel using side-scan sonar to map debris in the Santa Barbara Channel about 10 miles from shore.

Sonar appeared to show the debris in a single concentration within an area the size of a football field, and the survey was continuing one mile out in each direction, he said.

Some of the debris has been videotaped by a remote-operated underwater vehicle. Most of the debris examined so far were pieces about 5 feet or 6 feet long, but there was a section of fuselage estimated to be 10 feet long.

The submersible has sent up video of the tail and a 6-foot section of the leading edge of the horizontal stabilizer, Hammerschmidt said. The stabilizer is 40 feet long.

The process of getting sonar pictures of the ocean floor — sailors call it "mowing the lawn" — had been expected to take two to three days, but Hammerschmidt said it would likely be completed Friday.

After that, remote-operated vehicles like the one that salvaged the plane's "black box" flight recorders will be sent down to take video images and eventually help retrieve bodies and wreckage.

"You can't do it overnight," said Navy Capt. Terry Labrecque. "You have to be methodical."

The NTSB has previously said that radio transmissions and eyewitness reports from other commercial pilots in the area show the plane turned upside down or "corkscrewed" into the water following a series of increasingly desperate maneuvers that lasted at least half an hour.

Also Friday, relatives of victims — many of whom worked for or were connected with Alaska Airlines — were preparing for another private memorial, set for Saturday in the Pepperdine University chapel overlooking the ocean in Malibu. On Sunday, the Coast Guard planned to drop flowers from that service over the crash site.

Fifteen members of various bands of American Indians gathered on marshland near Point Mugu Friday for a ceremony in honor of victim Morris Thompson and his family.

A prominent Athabaskan Indian leader in Alaska and former commissioner for the Bureau of Indian Affairs, Thompson, 61, his wife, Thelma, and daughter Sheryl were killed in the crash.

The Indians burned sage to cleanse their spirits; passed a pipe, which is a symbol of life; took turns leading tribal chants; then turned east, west, south and north, some pointing feathers to the sky, to honor the four directions.

Only four bodies have been recovered. Relatives waited for word on further efforts to bring back remains.

The wreckage lies in an underwater canyon beneath the Santa Barbara Channel, where depths range from 90 feet at the edges to 700 feet.

World

Ethnic Albanians return to a divided, uncertain Kosovo

By DANICA KIRKA
Associated Press Writer

KOSOVSKA MITROVICA, Yugoslavia — Hasan and Hanife Jashari snuggled on their sofa for the first time in three weeks, after NATO peacekeepers spirited them home in a daring stand to begin healing this ethnically divided Kosovo town.

But the view from the front window of their high-rise apartment is different now. They look down and see barbed wire, French flags, armored personnel carriers and Greek troops.

"I'm in prison," Hasan Jashari said.

Peacekeepers escorted the Jasharis and 39 other ethnic Albanians to their homes Friday in the Serb-controlled part of town, north of the Ibar River — but it took tear gas and stun grenades to clear a path through rioting Serbs who oppose the move.

Now that they are home, families like the Jasharis are wondering what to do next. Despite the chaos below, the two 70-year-old pensioners were so eager to return that they made few provisions as to how they would even manage to survive.

"There's flour," Hasan Jashari said. "We will make do."

Just a few floors down, Dragomir Vorkapic is also baffled at what the future may bring. The 57-year-old Serb, who spent much of his life as a supervisor at the local gold and silver mines, has sent his family away. He is holed up in his home, uncertain and afraid that he could ever live in peace the way he once did.

"This is not an answer," he said, referring to the armed-camp atmosphere that now exists in his apartment building.

Building residents described their homes as once being among the finest in Kosovska Mitrovica. The apartments were granted to mine employees who worked the rich pits that once made this city relatively prosperous. Not only did all the neighbors know each other, they worked together all their lives.

But then came the conflict that has torn this province apart for the last several years.

Thousands of ethnic Albanians were killed by Serb forces during Yugoslav President Slobodan Milosevic's 18-month crackdown against Kosovo separatists.

AP

An ethnic Albanian who returned to his home in the Serb dominated sector of the ethnicly divided town of Kosovska Mitrovica talks on the telephone Saturday as a French soldier fixes his door, which was damaged during a weapons search.

Dozens flee in overnight clashes

PRISTINA, Yugoslavia (AP) — Dozens of ethnic Albanian women and children fled into Kosovo on Saturday after an exchange of gunfire in a town just outside the province's border, NATO peacekeepers said.

The exodus of some 175 people was the latest push from Dobrosin, a predominantly ethnic Albanian town in eastern Serbia. Hundreds of people have fled the area in the past two months, streaming into the closest Kosovo town of Gnjilane, about 35 miles southeast of Kosovo's provincial capital, Pristina.

The area near Dobrosin has been the site of sporadic clashes between ethnic Albanian guerrillas and Serb police. There are fears that the southern Serbian region could be the scene of renewed fighting similar to the conflict in Kosovo last year, which led to NATO attacks against Yugoslavia.

The newly formed rebel group is called the Liberation Army of Presevo, Medvedja and Bujanovac — named after three predominantly ethnic Albanian towns just outside Kosovo in southern Serbia. The group's fighters say they are trying to protect villagers in the region from attacks by Serb forces.

The refugees from Dobrosin crossed a checkpoint being manned about 2½ miles inside Kosovo by U.S. Sgt. Kelly Leaverton of Salem, Ore.

"Last night they rushed through here," he said. He said the villagers were traveling in cars, on horseback and on tractors.

Meanwhile, some 70 Serbs demonstrated in the Kosovo town of Gracanica to protest a grenade attack on a Serb home. Five people were injured, one seriously, said Warrant Officer Mark Cox, a NATO press spokesman.

NATO peacekeepers sealed off the city after violence broke out, Cox said.

Nigeria survives its divisions

By TIM SULLIVAN
Associated Press Writer

KADUNA, Nigeria — Nigeria's divisions are legion: Christian vs. Muslim, northerner vs. southerner, the people of the Niger Delta vs. oil companies, the masses of unemployed young people vs. anyone with money.

Each of these conflicts, and others, have exploded into violence in recent months, leaving thousands of people dead. Despite its transition to democracy last year, Africa's most populous nation remains a deeply fragile country that is capable of horrific bloodshed.

Yet somehow, Nigeria keeps holding together.

Over the past two weeks, Christian-Muslim violence shifted back and forth across Nigeria in a cycle of attack-and-revenge — the worst bloodletting since the country's civil war ended three decades ago.

In this northern city where the fighting began, entire neighborhoods were destroyed. Some officials say more than 2,000 people were killed in the violence, touched off by Christian demonstrations against a proposal to bring sharia, or Islamic law, to Kaduna state.

Nearly two weeks later, thousands of refugees across the country still live in army barracks and police stations, fearing further attacks. While many leaders in the overwhelmingly Muslim north have agreed to pull back from their demands for sharia, the tension continues to fester.

If sharia was the match that ignited the fighting, there was already plenty of kindling. In Nigeria, problems build on top of one another — religion twisted with ethnicity and geography, all magnified by desperate poverty, a history of corrupt politics and a lack of effective policing.

So when one problem flares, it can draw in others, spiraling into outright combat and pushing Nigeria, yet again, to what seems like the brink of complete collapse.

The fighting over sharia cut across Nigeria's many divisions. While on the surface it is a battle over religion, it also reflected ethnic and geographic rancor.

AP

Nigerian evangelical Christians of the Yoruba ethnic group dance and sing in an evening service held at an open air church in Lagos, Nigeria, Friday.

Northerners, nearly all of them Muslims of the Hausa tribe, were fighting Christian southerners, who are mainly Ibo and Yoruba.

In the South, the demand for sharia is widely viewed as part of a northern plot to ignite violence — and give the military an excuse to seize power again.

Northerners, whose domination of the military gave them enormous power during 15 years of army rule, have lost much of their influence since last year's transition to democracy.

The government lacks control here. Nigerian police are notoriously ill-trained, known more for demanding bribes than anything else. Many don't even have fuel for their vehicles.

When major trouble does start, there are few ways to quell it until the full weight of the army — regularly chastised by rights groups for its brutal methods — is called in.

"That kind of explosion just tells you the level of frustration that has built up," Rev. Matthew Kukah, secretary general of the Catholic Secretariat and a keen political observer, said of the Kaduna violence. "It's just a mindless orgy of violence that you can't explain."

For some Nigerians, the answer to these problems is division. Many Yoruba nationalists want the country split into semiautonomous regions, as it was after independence in 1960.

Nigeria, like many African states, is an unlikely country. Patched together by British colonialists, it combines hundreds of ethnicities and languages in a territory that stretches from jungle-covered hills to the dry sands of the Sahel.

At first glance, there would be little to unite Nigerians. But few people here want to see their country dismembered, and a deep strain of pride runs through the divided nation.

For all its problems, Nigeria is still the dominant country in the region. Nigerian-led peacekeepers helped end civil wars in Liberia and Sierra Leone, Nigerian oil money fuels businesses across West Africa and — not unimportantly in a soccer-mad continent — Nigeria's national team is among the best in Africa.

"We've come a long way to consider going our separate ways now," said Enema Oguchuku, an aide to President Olusegun Obasanjo. "No generation of Nigerians would like to be associated with the breakup of the country."

Putin hopes military vote will help him win election

By BARRY RENFREW
Associated Press Writer

MOSCOW — Soldiers in Chechnya cast absentee ballots Friday in Russia's presidential election and a top general said they overwhelmingly back acting President Vladimir Putin, who has made building a powerful military a key part of restoring Russia's global clout.

Reviving the military is one of the few firm ideas Putin has offered as he seeks a full term in March 26 elections. It's an idea that has gone down well with Russians nostalgic for the past, helping give Putin a commanding lead in the election race.

"Our country was a great, powerful and strong state and this is not possible if we do not have strong armed forces," he said shortly after becoming acting president when Boris Yeltsin resigned on Dec. 31.

Rebuilding the military will be difficult and expensive. The Russian economy is in shambles and the government is desperately short of cash. But Putin has already begun boosting the armed forces, including backing the military offensive to retake rebel Chechnya.

Among his first actions as acting president, Putin approved plans to step up the development and purchase of modern weapons to revive conventional forces. Military spending has increased, although no figures are available.

Modern weapons, including tanks, artillery and advanced fighter jets, are being developed, even if the government can't afford to do more than produce prototypes. Some of the weapons are being offered to other nations such as India to help underwrite production for the Russian military.

"Putin has already done quite a lot for the armed forces. He has shown strong will and the military like it," said Yevgeny Volk of the Heritage Foundation's Moscow office. A top commander of Russia's war in Chechnya, Col. Gen. Gennady Troshev, echoed that sentiment Friday as troops began voting.

"We know this man who is together with the military fulfilling this task today while supporting us, the military," he said.

Putin's calls to revive the shattered armed forces have earned strong support from top generals and many ordinary Russians who see the West as a threat. Close relations with the West soured under Yeltsin, who objected to NATO's expansion and its campaign against Yugoslavia, a Russian ally.

Putin, a former KGB officer, says the United States and other nations must treat Russia as an equal. He has shown a willingness to be conciliatory, offering to revive nuclear weapons reductions and even mused about joining NATO.

But even if relations with the West are reasonable, Putin will put the military ahead of most priorities because making Russia strong is his main goal, analysts say.

"Putin's promises to support the military contradict his pledge to stick to rigid financial policies and continue free-market reforms. Choosing between the two, he is likely to take the pro-military course," said Pavel Felgenhauer, a military analyst.

For all the tough talk, reviving the Russian military will be a huge, perhaps impossible, task. The Russian economy has been in recession for a decade. The current defense budget is a paltry $5.1 billion, compared with annual U.S. defense spending of about $300 billion.

Russian defense officials paint a dismal picture of the military, which has been cut from 5 million personnel to 1.2 million in the past decade:

- The air force has not received a single new plane since 1992 and none are expected before 2001. Fuel is so scarce that pilots average 25 hours flying time a year, compared to a minimum 200 hours in Western air forces.
- Seventy percent of navy ships need major repairs. Scores of ships have sunk because their hulls rusted out. Just three nuclear submarines are thought to be on patrol at any one time out of a force that numbered more than 100 vessels a decade ago.
- Nuclear forces are fast approaching obsolescence and just a handful of new missiles have been built.

AP

A street stand in Moscow Friday sells Russian wooden nesting dolls of past and present leaders (from left), acting President Vladimir Putin, former President Boris Yeltsin and former Soviet General Secretaries Mikhail Gorbachev and Leonid Brezhnev. Putin holds a wide lead in presidential elections scheduled for March 26.

All eyes on Kohl as he returns

By BURT HERMAN
Associated Press Writer

BERLIN — Helmut Kohl appeared in parliament Friday for the first time since a financial scandal involving his party broke in November, a comeback timed to coincide with an anniversary linked to his greatest achievement: German unification.

The majority of Germans, however, felt the ex-chancellor should have stayed home: a Forsa poll released Friday that found 73 percent of the 1,006 people surveyed opposed Kohl's return. The poll's margin of error was 3 percent.

Although he wasn't even scheduled to speak, all attention focused on the statesman who led Germany for 16 years as he walked into parliament on the tenth anniversary of the first parliamentary elections ever held in communist East Germany. That election opened the way for Germany's reunification.

Kohl took his seat in the Bundestag's third row Friday — one row further back than usual. His seat was changed because of a leadership shake-up in his Christian Democrat party sparked by the scandal.

Before Friday, Kohl hadn't taken his parliament seat since Nov. 24, he faces fines for the missed sessions.

By returning for the commemoration — rather than a floor debate — Kohl avoided direct criticism from parliament members for the financing scandal.

He was given a cool reception by fellow party members, some of whom shook his hand, but who were clearly trying to make an awkward moment seem like just another day at the Reichstag.

Kohl has given up the honorary chairmanship of the Christian Democrats, but still holds his seat in the Bundestag, or lower house of parliament. Despite calls that he should also resign his seat, Kohl has insisted he will keep it to maintain the legal immunity granted parliament members.

The ex-chancellor is facing both criminal and parliament investigations connected to the scandal, which has extended from Kohl's initial admissions of accepting illegal donations, to reveal an entire system of corrupt practices by the Christian Democrats during Kohl's 25 years as party chairman.

At a parliamentary ceremony in November marking the tenth anniversary of the Oct. 3, 1990, fall of the Berlin Wall, Kohl had been a featured speaker along with former Soviet leader Mikhail Gorbachev and former U.S. President George Bush.

Just weeks later, Kohl admitted accepting up to $1 million in off-the-books donations.

That revelation marked the beginning of his retreat from the public eye. The Christian Democrats even canceled a planned gala celebration of Kohl's 70th birthday on April 3.

But Kohl appeared pleased Friday as speakers praised his historic role during a three-hour event at which representatives from all major parties took the floor.

The biggest applause came when Sabine Bergmann-Pohl, the former speaker of the freely elected East German parliament, insisted his "great merits" were not forgotten.

AP

A U.S. soldier stands guard in front of weapons seized by the U.S. military in a tour the U.S. Army's Camp Bondsteel in eastern Kosovo on Friday. American soldiers took charge of the guns after an operation along the eastern Kosovo-Serbian boundary.

U.S. displays seized weapons in Kosovo

By DANICA KIRKA
Associated Press Writer

CAMP BONDSTEEL, Yugoslavia — The U.S. military trotted out a cache of aging rifles and freshly minted uniforms Friday to display its resolve to crack down on ethnic Albanian extremists along Kosovo's tense boundary with southern Serbia.

They admit, though, that they're still trying to sort out who's behind the new guerrilla group and how much of a threat it represents.

The presentation of booty on a freshly scrubbed warehouse floor at the main U.S. Army base in Kosovo came only days after Army units swept through villages nestled along the province's administrative eastern boundary with Serbia. The raid emptied houses of hand grenades, old Yugoslav Army helmets, ammunition belts and other paraphernalia allegedly used by the militants in attacking police units in Serbia's Presevo Valley.

"A clear message has been sent," said Brig. Gen. Ricardo S. Sanchez, who commands U.S. forces in Kosovo. "We will not condone — and we will definitely not tolerate — any sort of extremist activity based in our sector."

Both Kosovo and the region right across the border are technically part of Serbia, the larger member of the Yugoslav federation led by Slobodan Milosevic. But Kosovo has been under international control since last year's conflict between ethnic Albanians and Milosevic's Serb forces led to NATO bombing of Yugoslavia.

Now, the United States and other Western governments fear that the boundary region could be the scene of renewed fighting.

Several hundred ethnic Albanian guerrillas are believed to have crossed into Serbia to attack Serb villages. More than a year ago, similar attacks in Kosovo prompted Milosevic to drive hundreds of thousands of Albanians from the province.

The new ethnic Albanian insurgents have mobilized in response to what they describe as continuing police harassment in southern Serbia. Though Western diplomats estimate the group numbers to more than 450 regulars, they fear that any conflagration would prompt Kosovo Albanians to stream across the boundary to aid their ethnic kin.

World News


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Lawmakers get tough on criminal kids

TALLAHASSEE (AP) — Lawmakers took aim at young criminals Monday as the House passed a bill to send juveniles who keep getting in trouble into the adult system and the Senate passed one to put gun-toting teens behind bars for a long time once they get there.

The Senate voted to apply Florida's 10-20-Life law to 16- and 17 year-olds who commit serious crimes while they're carrying a gun. That law, passed last year for adults 18 and over, sets tough minimum prison terms: 10 years for having a gun during a crime, 20 years for using it and 25 years to life for seriously hurting or killing someone.

The 32-5 vote came only after supporters of the bill (SB 1548) agreed to soften it with a last-minute change to have it only apply when the teen has previously committed at least one felony.

Voting against the bill were: Sen. Kendrick Meek, D-Miami; Sen. Jim Hargrett, D-Tampa; Sen. Betty Holzendorf, D-Jacksonville, Sen. Daryl Jones, D-Miami; and Sen. Howard Forman, D-Pembroke Pines.

In the House, that bill was still in its original, tougher version, applying to teens who've never been in trouble with the law but use a gun in a felony. But that version (HB 159) was killed in the House Criminal Justice committee later in the day so the House now will have to consider the Senate's softer version.

The full House passed its own juvenile justice measure, sending to the Senate a bill to put 16- and 17-year-olds in the adult system when they repeatedly commit serious crimes.

The bill (CS/CS/HB 69), which passed the House 80-31, targets youths who've committed three felonies more than 45 days apart, and are then charged with a fourth violent felony such as murder or robbery.

"These are predators whose conduct is escalating," said Rep. Randy Ball, R-Mims.

Both measures are teen versions of get-tough-on crime bills that passed last year. In addition to 10-20-Life, the Legislature last year passed a measure toughening sentences for three time felons.

Some black lawmakers expressed concern that their constituents will bear the brunt of the bills in a criminal system in which they say blacks are over-targeted.

But as was the case last year, the main concern of opponents was the bills' one-size-fits-all approach, where judges have no ability to take into account special circumstances.

AP

Caring for Crash

Danielle Schultz, a University of Florida junior, coaxes "Crash," a one-week-old standard bred philly to feed from a bottle on Tuesday. Schultz, from Brookhaven, Miss., is an animal science major at UF's Institute of Food and Agricultural Sciences, and is a full time resident at UF's horse teaching unit where she and other IFAS students take care of the horses on the farm. Crash, nicknamed for its need to wear a helmet, was born on the farm last week, but was not able to emerge from her birthsack soon enough, and suffered from a short period of oxygen deprivation. The philly is expected to recover fully and the helmet is a precautionary measure to keep the horse from bumping its head while in this temporary condition.

Supreme Court justice tells attorneys of lessons learned in brother's death

TAMPA (AP) — U.S. Supreme Court Justice Clarence Thomas has endured the rigors and reveled in the benefits of public life, but he said Tuesday that it took his younger brother's death to put his life into perspective.

A grieving Thomas described for a gathering of attorneys an intensely private moment after his younger brother Meyers died in January after collapsing while jogging near his home in New Orleans.

"I sat there and looked at the lifeless body of my brother, the body without the spirit," Thomas said. "I tried to make sense of it.

Clarence Thomas, a justice since 1991 who endured perhaps the most controversial confirmation hearings in U.S. history, told the 300 members of the Tampa Bay Chapter of the Federal Bar Association that the past few weeks of work at the Supreme Court have been difficult

"What it did was it put my life in perspective about what's important. What's the purpose? Is it important to be popular? Is it important to have agreement, to have unanimity? Or is it more important to be principled?"

Thomas said it became clear to him at that moment that the permanent things in life — family, friends and faith, what he calls the three Fs — overshadowed all others.

"As I stood there at the funeral parlor, having taken away a week from work, work became irrelevant suddenly," he said. "Being on the Supreme Court was meaningless suddenly."

Sounding tired and at times disgusted with those who "trivialize" the work of the U.S. Supreme Court, Thomas said he has not made many public appearances since his brother's death. On this trip, he was accompanied by his wife Virginia and spent Monday evening dining with Tampa Bay Buccaneers Coach Tony Dungy.

Thomas, a justice since 1991 who endured perhaps the most controversial confirmation hearings in U.S. history, told the 300 members of the Tampa Bay Chapter of the Federal Bar Association that the past few weeks of work at the Supreme Court have been difficult.

"I thought the longer I was there the cases would get easier," Thomas said. "But frankly they are harder. They get harder when you try to get them right.

"It's almost so hard it hurts."

Thomas decried the "court watchers" who keep score on who writes the most opinions or the most dissents. He singled out one case of commentary on which justices were smokers that came as the court was considering whether the Food and Drug Administration could regulate tobacco.

"What we have done to our society is we have become cynical and snide and snotty about tough decisions," Thomas said. "You can't talk about anything unless you are glib and snide and know it all."

Thomas said he is grateful to be a member of a body where important issues are still discussed civilly and where he and his fellow justices agonize over their decisions.

"Do I come home some days exasperated? I sure do," Thomas said. "I wouldn't be a human being if I didn't. Do I wish I could get more votes on the things I think matter? Absolutely. Do I think I am omniscient? Absolutely not.

"If there was unanimity on the court there would be eight jobs not worth having. We are simply not there to always agree. We are not robots."

Kayla's father pleads guilty to two lesser charges

TAVARES (AP) — A man accused of killing his 6-year-old daughter has pleaded guilty to two lesser charges but still faces trial for first-degree murder.

Richard Adams, 28, pleaded guilty last week to tampering with evidence by burying his daughter, Kayla McKean, in the Ocala National Forest in November 1998. He also pleaded guilty to resisting arrest without violence for telling police Kayla had wandered away from the family's apartment in Clermont.

Circuit Judge T. Michael Johnson deferred sentencing on the guilty pleas until after Adams' first-degree murder trial, which starts May 1.

Kayla's death sparked a series of child welfare reforms after workers from the Department of Children & Families failed to notice that she was being abused by her father.

When Kayla disappeared, several hundred volunteers and law enforcement officers searched for her body near her home in Clermont, about 20 miles west of Orlando. Adams eventually confessed to beating and kicking her to death and burying her in the national forest, about 50 miles northeast of Clermont.

Local/State

World News

Israelis, Palestinians return to negotiations

JERUSALEM (AP) — Israel and the Palestinians resumed negotiations Saturday night despite smoldering Palestinian resentment over Israeli proposals for a permanent peace agreement, an American official said Saturday.

Israeli negotiator Oded Eran met his Palestinian counterparts Yasser Abed Rabbo and Saeb Erekat at a secret location to avoid the media. Also present were American envoy Dennis Ross and the U.S. ambassador to Israel, Martin Indyk, U.S. embassy spokesman Larry Schwartz said.

Ross held two hours of talks on Friday night with Palestinian leader Yasser Arafat in the West Bank city of Ramallah.

On Wednesday Palestinian representatives walked out of talks at the Israeli Red Sea resort of Eilat, after the Israelis submitted a map showing a proposal for a Palestinian state on territory which the Palestinians viewed as totally inadequate.

The new round of talks was to continue through Monday. Afterward, Ross was expected to return to Washington to brief President Clinton and Secretary of State Madeleine Albright.

Under the Israeli proposal, the Palestinian state would consist of one enclave in the Gaza Strip and two in the West Bank without territorial contiguity. The plan covered only 66 percent of the West Bank, a Palestinian official said.

The Palestinian Cabinet on Friday issued a statement demanding full implementation of U.N. resolutions it says require Israel to withdraw from all of the West Bank, Gaza Strip and from east Jerusalem, where the Palestinians want to establish their capital.

Israel insists on retaining all of Jerusalem and large areas of the West Bank.

Palestinian negotiator Saeb Erekat said after the Ross-Arafat talks "the peace process is facing major difficulties but very strenuous efforts are being made to overcome them."

Ross said the issues are difficult, but this "is not a surprise to anybody because we are talking about the final status issues," which are the most intractable.

They include the status of Jerusalem, the permanent borders and Palestinian demands for the return of the Palestinian refugees to their homes.

Church rebuilding role in Mexico as election nears

MEXICO CITY (AP) — It is a sight not seen in perhaps 140 years: an open-air Mass by the Roman Catholic Church attended by hundreds of thousands in the heart of the nation, the sprawling plaza known as the Zocalo.

The celebration Saturday is yet another sign that the long and bloody hostility between the government and church in Mexico has broken down, and that the church is playing a more public role.

The new role has also affected Mexico's tightly contested presidential race. Church leaders have been increasingly vocal in calling for democratic reform, and politicians from all sides have openly courted church supporters.

In a March 25 pastoral letter, Mexico's bishops called for "a reformulation of the whole political system," including constitutional reforms.

"We Mexicans are living not only in an epoch of change, but of a true change of epochs," the bishops said.

That change has not been comfortable for all, particularly as the governing Institutional Revolutionary Party, the PRI, fights to continue its 71-year hold on power.

Church and state have sparred in the press over just how far priests can go to influence politics under a 1992 reform that ended many of the draconian laws imposed on the church.

Those restrictions, starting in 1855, were part of a movement to separate church from state that at times erupted into bloodshed. Among the laws was an 1873 ban on outdoor religious ceremonies. The Zocalo has not seen an open-air Mass since even before that ban was imposed.

In the election campaign, the leading opposition candidate, Vicente Fox, has pushed the limits of the church's new role — once by displaying a banner of the Virgin of Guadalupe, Mexico's patron saint, at a campaign rally.

He recently distributed pamphlets quoting the Pastoral Letter's comment that "a fuller democratic culture supposes the real possibility" of alternating parties in power.

Even the PRI candidate, Francisco Labastida, has appeared with prominent bishops. Leftist candidate Cuauhtemoc Cardenas, whose father was a president who took part in repressing the church in the 1930s, gave Pope John Paul II keys to the city last year, when he was mayor.

"It's hard to say whether it tilts the vote one way or another from a partisan standpoint," said M. Delal Baer, a Mexico specialist at the Center for Strategic and International Studies in Washington, D.C.

But the church's strong call for clean elections "reinforces the point that everyone is watching," she said.

Saturday night's Mass is the highlight of the National Eucharistic Congress, gathering all the nation's bishops and a Vatican representative.

Hundreds of thousands of Catholics were expected to gather in the vast plaza before the Metropolitan Cathedral built by cross-carrying Spanish conquistadors atop Aztec pyramids in the 16th century.

With 100 million people, Mexico is one of the most populous predominantly Catholic nations in the world. The Pope was greeted with raucous fervor on visits to Mexico in 1979, 1990, 1993 and 1999.

The church played a major part in political and economic life for about 350 years. In the 18th century, however, reformers slashed away at the church's privileges and land holdings.

The Constitution of 1857 separated church and state, and other laws removed marriage and divorce from church jurisdiction. Other laws forbade church schools and religious orders.

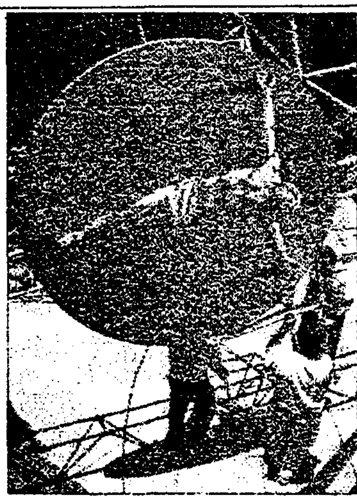
Even tougher limits were imposed on the church in 1917 after the Mexican Revolution, leading to the Cristero War of the 1920s in which tens of thousands died fighting over restrictions on religion. Fox's center-right National Action Party has some roots in the Cristero movement.

Those restrictions gradually faded in practice and the 1992 law formally ended most.

But the government still bans religious involvement in politics. President Ernesto Zedillo last year called leftist priests in Chiapas state "theologians of violence," accusing them of aiding a guerrilla revolt.

Government officials last week growled at a pamphlet issued on Wednesday urging Catholics to vote for candidates who oppose abortion, favor moral education and promote social programs.

The church insists it is nonpartisan, but has a right to promote political changes in line with its values.



AP

Workers carry an image of Jesus Christ in front of the Zocalo Cathedral in Mexico City on Saturday.

World News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Attachment K
3rd Affidavit of Michael R. Dunn

K

APPLICATION BY FOREIGN LIMITED LIABILITY COMPANY FOR AUTHORIZATION TO TRANSACT BUSINESS IN FLORIDA

IN COMPLIANCE WITH SECTION 608.503, FLORIDA STATUTES, THE FOLLOWING IS SUBMITTED TO REGISTER A FOREIGN LIMITED LIABILITY COMPANY TO TRANSACT BUSINESS IN THE STATE OF FLORIDA:

1. Cox Communications Gulf Coast, L.L.C.
(Name of foreign limited liability company must end with the words "limited company" or their abbreviation "L.C." if not so contained in the name at present.)

2. Delaware
(Jurisdiction under the law of which foreign limited liability company is organized)

3. 58-2487265
(FEI number, if applicable)

4. July 2, 1999
(Date of Organization)

5. 2050
(Duration: Year limited liability company will cease to exist or "perpetual")

6. the company will commence business in Florida on or about September 15, 1999
(Date first transacted business in Florida. (See sections 608.501, 608.502, and 817.155, F.S.)

7. 320 Racetrack Road, NW, Ft. Walton Beach, FL 32547
(Street address of principal office)

8. List name, title, and business address of each managing member[MGRM] or manager[MGR]who will manage the foreign limited liability company in Florida: (attach additional page if necessary)

NAME & ADDRESS:	TITLE:	NAME & ADDRESS:	TITLE:
Cox Communications Florida	Manager		
1400 Lake Hearn Drive, NE			
Atlanta, GA 30319			

FILED
SECRETARY OF STATE
DIVISION OF CORPORATIONS
99 SEP 13 PM 1:25

9. Attached is an original certificate of existence, no more than 90 days old, duly authenticated by the Secretary of State or the proper official having custody of records in the state under the law of which it is organized. (A photocopy is not acceptable. If the certificate in in a foreign language, a translation of the certificate under oath of the translator must be submitted.)

State of Delaware

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "COX COMMUNICATIONS GULF COAST, LLC" IS DULY FORMED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTIETH DAY OF AUGUST, A.D. 1999.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL TAXES HAVE NOT BEEN ASSESSED TO DATE.

Edward J Freel

Edward J. Freel, Secretary of State

3065843 8300

991348842

AUTHENTICATION: 9932272

DATE: 08-20-99

CERTIFICATE OF DESIGNATION OF REGISTERED AGENT/REGISTERED OFFICE

PURSUANT TO THE PROVISIONS OF SECTION 608.415 or 608.507, FLORIDA STATUTES, THE UNDERSIGNED LIMITED LIABILITY COMPANY SUBMITS THE FOLLOWING STATEMENT TO DESIGNATE A REGISTERED OFFICE AND REGISTERED AGENT IN THE STATE OF FLORIDA.

1. The name of the Limited Liability Company is:

Cox Communications Gulf Coast, L.L.C.

2. The name and the Florida street address of the registered agent and office are:

Corporation Service Company
(Name)

1201 Hays Street
Florida street address (P.O. Box **NOT** ACCEPTABLE)

Tallahassee, FL 32301
City/State/Zip

Having been named as registered agent and to accept service of process for the above stated limited liability company at the place designated in this certificate, I hereby accept the appointment as registered agent and agree to act in this capacity. I further agree to comply with the provisions of all statutes relating to the proper and complete performance of my duties, and I am familiar with and accept the obligations of my position as registered agent.

By: Deborah D. Skipper
(Signature) **Deborah D. Skipper**
as its agent

Filing Fee: $ 35 for Designation of Registered Agent

AFFIDAVIT OF MEMBERSHIP AND CONTRIBUTIONS OF FOREIGN LIMITED LIABILITY COMPANY

The member or authorized representative of a member of Cox Communications Gulf Coast, L.L.C. certifies:

1) the above named limited liability company has at least one member;

2) the total amount of cash contributed by the member(s) is $ 100,000,000;

3) if any, the agreed value of property other than cash contributed by member(s) is $ 140,000,000;
(A description of the property is attached and made a part hereto.)
and

4) the total amount of cash and property contributed and anticipated to be contributed by member(s) is $ 240,000,000.
(This total includes amounts from 2 and 3 above.)

Cox Communications Florida, Manager
By: Cox Cable New York City, Inc., general partner

By: ______________________
Signature of a member or an authorized representative of a member.
(In accordance with section 608.408(3), Florida Statutes, the execution of this affidavit constitutes an affirmation under the penalties of perjury that the facts stated herein are true.)

Andrew A. Merdek, Secretary
Typed or printed name of signee

Filing Fee: $250.00 for Application and Affidavit

Property Description - Cox Communications Gulf Coast, L.L.C.:

Cable television franchises, licenses and related contracts; distribution network; electronics/equipment; office equipment; furniture/fixtures; vehicles; inventory; books and records of operation.

Attachment L
3rd Affidavit of Michael R. Dunn

L

COX COMMUNICATIONS INC /DE/

Form: **8-K** Filing Date: 10/5/1999 Filing Index

TYPE: 8-K
SEQUENCE: 1
DESCRIPTION: 8-K

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

Current Report Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported):September 28, 1999

Cox Communications, Inc.

(Exact name of Registrant as specified in its charter)

Delaware

(State or other jurisdiction of incorporation or organization)

1-6590	58-2112288
(Commission File Number)	(I.R.S. Employer Identification Number)

1400 Lake Hearn Drive Atlanta, Georgia	30319
(Address of principal executive offices)	(Zip Code)

(404) 843-5000

(Registrant's telephone number, including area code)

Item 5. Other Events.

On September 28, 1999, Cox Communications, Inc. ("Cox") entered into a new 364-day credit agreement and amended and restated its 5-year credit agreement providing for borrowings of up to $1.5 billion and $1.2 billion, respectively. As of the date this report is being filed, Cox had not borrowed under either credit agreement.

On October 1, 1999, Cox completed acquisition of the cable television systems owned by Media General, Inc. A copy of the press release announcing the completion of this transaction is attached as exhibit 99.1.

Also on October 1, 1999, Cox restructured its partnership with Time Warner Entertainment Company L.P. As part of this restructuring, Cox acquired control of the cable television system serving Fort Walton Beach, Florida, and Time Warner acquired control of the cable television system serving Staten Island, New York. In connection with the restructuring, the Fort Walton Beach system and Cox's cable television system serving Pensacola, Florida, received approximately $104 million in cash to be used for capital expenditures and a reduction of indebtedness. A copy of the press release announcing the completion of this transaction is attached as exhibit 99.2.

Item 7. Exhibits

Exhibit 99.1 Press Release, dated October 1, 1999

Exhibit 99.2 Press Release, dated October 5, 1999

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

COX COMMUNICATIONS, INC.

Dated: October 5, 1999

By: /s/ Andrew A. Merdek

Andrew A. Merdek
Secretary

Attachment M
3rd Affidavit of Michael R. Dunn

M

Foreign Profit

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P08560	581620087	12/30/1985
State	**Status**	**Effective Date**
DE	INACTIVE	NONE
Last Event	**Event Date Filed**	**Event Effective Date**
WITHDRAWAL	07/15/1997	NONE

Registered Agent

Name & Address
NONE FL
Registered Agent Revoked: 07/15/1997

Officer/Director Detail

Name & Address	Title
ROBBINS, JAMES O. 1400 LAKE HEARN DR. ATLANTA GA	PD
HAYES, JIMMY W. 1400 LAKE HEARN DR. ATLANTA GA	VD
HATCHER, JAMES A. 1400 LAKE HEARN DR. ATLANTA GA	D
BARNETT, PRESTON B 1400 LAKE HEARN DR ATLANTA GA	V
MERDEK, ANDREW A 1400 LK HEARN DR ATLANTA GA	S
CLEMENT, DALLAS S 1400 LAKE HEARN DR ATLANTA GA	T

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1996	04/29/1996	Y
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Corporations Inquiry Corporations Help

Attachment N
3rd Affidavit of Michael R. Dunn

N

Florida Department of State, Division of Corporations
Corporations Online
www.sunbiz.org Public Inquiry

EMERALD COAST CABLE TELEVISION

C/O COX COMMUNICATIONS, INC.
1400 LAKE HEARN DRIVE, N.E.
ATLANTA, GA 30319- US

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G92329900048	EXPIRED	10/29/1992
Expiration Date	**Current Owners**	**County**
12/31/1997	000000002	MULTIPLE
Total Pages	**Events Filed**	**FEI Number**
000000001	000000000	NONE

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Owner Information

Name & Address	FEI Number	Charter Number
COX CABLE NEW YORK, A NEW YORK GENERAL PARTNERSHIP 100 CABLE WAY STATEN ISLAND, NY 10311 US	N/A	NONE
TIME WARNER ENTERTAINMENT COMPANY, L.P. 75 ROCKEFELLER PLAZA, 25TH FLOOR NEW YORK, NY 10019 US	N/A	A33051

Document Images

Action	Document Number	Fax Number	Contact Name
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PROPOSED
ORDINANCE NO. 17-99

ORDINANCE NO. 21-99

AN ORDINANCE
TO BE ENTITLED:

AN ORDINANCE OF THE CITY OF PENSACOLA, FLORIDA, AMENDING ORDINANCE 53-91; TRANSFERRING THE EXISTING CABLE TELEVISION FRANCHISE to **COX COMMUNICATIONS GULF COAST, L.L.C.**; PROVIDING FOR SEVERABILITY; REPEALING CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY OF PENSACOLA, FLORIDA:

SECTION 1. Section 2(b) of Ordinance No. 53-91 is hereby amended to read:

b. *Company* means Cox Communications Gulf Coast, L.L.C., a Delaware corporation maintaining offices in Pensacola, Florida, and any successor in interest including any subsidiary, parent or other entity, to whom an ownership interest may be transferred pursuant to Section 12 of this ordinance.

SECTION 2. If any word, phrase, clause, paragraph, section or provision of this ordinance or the application thereof to any person or circumstance is held invalid or unconstitutional, such finding shall not affect the other provisions or applications of the ordinance which can be given effect without the invalid or unconstitutional provisions or application, and to this end the provisions of this ordinance are declared severable.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

SECTION 4. This ordinance shall take effect immediately upon its passage by the City Council.

Passed: **April 29, 1999**

Approved: ______________________
Mayor

Attest:

Shirley J. White
City Clerk

Legal in form and valid if enacted:

____
City Attorney

CERTIFICATION
I, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN [illegible]. WITNESS MY HAND AND THE CORPORATE [illegible] CITY OF PENSAC[illegible]

FLORIDA THIS THE 6th
July A.D. 2000
Shirley J. White
CITY CLERK OF [illegible]
CITY OF PENSACOLA, FLORIDA

6-15-00
300

PROPOSED
ORDINANCE NO. 43-98

ORDINANCE NO. 44-98

AN ORDINANCE
TO BE ENTITLED:

AN ORDINANCE OF THE CITY OF PENSACOLA, FLORIDA, AMENDING ORDINANCE NO. 53-91; TRANSFERRING THE EXISTING CABLE TELEVISION FRANCHISE TO **COX COMMUNICATIONS PENSACOLA, L.L.C.**; PROVIDING FOR SEVERABILITY; REPEALING CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY OF PENSACOLA, FLORIDA:

SECTION 1. Section 2(b) of Ordinance No. 53-91 is hereby amended to read:

b. *Company* means Cox Communications Pensacola, L.L.C., a Delaware corporation maintaining offices in Pensacola, Florida, and any successor in interest including any subsidiary, parent or other entity, to whom an ownership interest may be transferred pursuant to Section 12 of this ordinance.

SECTION 2. If any word, phrase, clause, paragraph, section or provision of this ordinance or the application thereof to any person or circumstance is held invalid or unconstitutional, such finding shall not affect the other provisions or applications of the ordinance which can be given effect without the invalid or unconstitutional provisions or applications, and to this end the provisions of this ordinance are declared severable.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

SECTION 4. This ordinance shall take effect immediately upon its passage by the City Council.

Passed: September 10, 1998

Approved:
Mayor

Attest:

Shirley F. White
City Clerk

Legal in form and valid if enacted:

City Attorney

CERTIFICATION

I, DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN [illegible] WITNESS MY HAND AND THE CORPORATE SE[illegible] THE CITY OF PENSACOLA FLORIDA THIS THE 6th D[illegible] July A.D. 2000

Shirley F. White
CITY CLERK OF THE
CITY OF PENSACOLA, FLORIDA

P

RESOLUTION NO 99 - 08

A RESOLUTION OF THE CITY COUNCIL OF NICEVILLE APPROVING THE TRANSFER OF COX COMMUNICATION'S CABLE SYSTEM FROM TWC CABLE PARTNERS, INC. TO COX COMMUNICATIONS GULF COAST, LLC UPON COX COMMUNICATIONS GULF COAST, LLC BECOMING A SIGNATORY ON FRANCHISE ORDINANCE NO. 94-25; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council is required to expressly approve the transfer of its cable television franchise ordinance, Ordinance No. 94-25, to any other person or corporation than the original franchisee, TWC CABLE PARTNERS, INC.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Niceville does hereby approve the transfer of cable communications franchise, Ordinance No. 94-25, to COX COMMUNICATIONS GULF COAST, LLC and states as follows:

SECTION 1. The approval of this transfer is expressly conditioned upon the complete acceptance by COX COMMUNICATIONS GULF COAST, LLC of all terms, conditions and limitations imposed by Ordinance 94-25 as indicated by its execution of the signatory page attached to this resolution.

ADOPTED in regular session this 11th day of May, 1999.

Randall Wise
MAYOR

ATTEST:

Daniel J. Doucet
CITY CLERK

STATE OF FLORIDA

CITY OF NICEVILLE

I, Daniel J Doucet, City Clerk for the City of Niceville, Florida, do hereby certify the foregoing is a true and correct copy of the City of Niceville, Florida, Resolution 99-08, May 11, 1999, and appears on file in the office of the City Clerk.

IN WITNESS WHEREOF, I hereunto set my hand and official seal this 12th day of May, 1999.

Daniel J. Doucet, CMC/AAE
City Clerk

ACCEPTANCE OF ORDINANCE 94-25

Cox Communications Gulf Coast, LLC, by its duly authorized officer, does hereby accept the terms and conditions of Ordinance 94-25, the TWC Cable Partners, Inc. Cable communications franchise with the City of Niceville, Florida, and as franchisee thereunder, agrees to perform, assume and comply with all of the terms and conditions, covenants and obligations of said franchise.

DATED this 14th day of May, 1999.

COX COMMUNICATIONS GULF COAST, LLC

By: L. Keith Gregory

Name: L. Keith Gregory
Title: Vice President/General Manger

ATTEST:

Bonnie Shablaski

Witness

ARTICLE III. TWC PARTNERS D/B/A EMERALD COAST CABLE TELEVISION*

***Editor's note**--Article III formerly contained the franchise with Warner Cable Corporation, Ordinance No. 438, adopted Feb. 12, 1980. Such ordinance was repealed by and replaced with Ordinance 94-25, adopted Nov. 3, 1994, the franchise with **TWC Partners** D/B/A Emerald Coast Cable Television herein set out. Style and capitalization have been made uniform, and words in brackets [] have been included by the editor for clarity.

ORDINANCE NO. 94-25

AN ORDINANCE OF THE CITY OF NICEVILLE, FLORIDA, REPEALING ORDINANCE NO. 438, FEBRUARY 12, 1980; TERMINATING THE EXISTING CABLE TELEVISION FRANCHISE TO **TWC PARTNERS** D/B/A EMERALD COAST CABLE TELEVISION; REPLACING SAME WITH RENEWED FRANCHISE; PROVIDING FOR SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NICEVILLE, FLORIDA:

Section 1. Short title.

This ordinance shall be known and may be cited as the Niceville Cable TV Franchise ordinance.

Section 2. Definitions.

As used in this ordinance, and unless the context clearly indicates otherwise:

(a) *City* means the City of Niceville, Florida.

(b) *Company* means **TWC Partners** D/B/A Emerald Coast Cable Television, maintaining offices in Okaloosa County, Florida, and any successor in interest including any subsidiary, parent or other entity, to whom an ownership interest may be transferred pursuant to Section 12 of this ordinance.

(c) *Council* means the city council of the city.

(d) *Person* means any person, firm, partnership, association, company, or organization of any kind.

(e) *System* means each and every component and the whole of the telecommunication system described in Section 5 of this ordinance.

(f) *Gross revenues* means all income derived by and attributable to the operation of the system, including, but not limited to, income derived from services, advertising, channel leasing, commissions from shopping channels, revenue from the installation, sale or rental of any equipment used in the operation of the system, revenue from the operation of an institutional network and any other income of whatever description derived from the system's use of city rights-of-way, but excluding bad debt, sales taxes and franchise fees paid to any government agency.

(g) *Major Stockholder* means a beneficial owner, directly or indirectly, of 10% or more of the issued and outstanding voting stock of any corporation.

Section 3. Grant of franchise.

(a) There is hereby granted by the city to the company the franchise and privilege of constructing, erecting, operating, and maintaining in, upon, along, across, above, over and under, the streets, alleys, public ways and public places, now laid out or dedicated and all extensions thereof and additions thereto throughout the corporate limits of the city, such wires, poles, cables, underground conduits, conductors and a telecommunication system for the interception, amplification, and distribution of television and radio signals and energy; said grant of authority to be subject to conditions contained in this ordinance and all rules and regulations promulgated by the city in accordance with this ordinance. The rights herein granted shall extend to any area annexed to the City of Niceville, and the company shall be bound by the same rules and regulations as to such area as are otherwise herein or hereafter provided.

(b) The franchise granted hereby shall not be exclusive. The city reserves the right to grant the use of streets, alleys, public ways, and places to any person for any lawful purposes. The city also reserves the right to enter into the cable television business as owner, operator, or other capacity in competition with the company at any time during the period of this franchise or any extension thereof.

(c) The company shall have the right to enter into agreements for the attachment onto and use of facilities owned and operated by public utilities operating within the city, and shall enter into such agreements before undertaking to use such facilities, and shall strictly comply with the terms, provisions, and restrictions of said agreements.

Section 4. Term of agreement and franchise fee.

(a) The franchise granted the company herein shall commence on October 1, 1994, and shall continue until September 30, 2009 unless renewed pursuant to mutual agreement between the company and the city or pursuant to the provisions of the Cable Communications Policy Act of 1984, as that statute may be amended from time to time. An application for renewal shall be accompanied by a nonreturnable application fee of $500.00. Upon any ninety (90) bay [day] termination notice of the franchise by the city or the city's refusal to renew the same pursuant to applicable federal law, the company shall, within ninety (90) days of receipt of notice of termination or refusal to renew the franchise, remove its facilities and equipment. In the event that the company does not remove its facilities and equipment within the time provided in this section, the city may do so with the removal costs to be borne by the company. The company will give the city one hundred eighty (180) days notice of its refusal to renew the franchise.

(b) In accepting this franchise agreement, both the city and the company commit themselves to undertake all reasonable steps to provide the citizens of Niceville with a full range of programming and services commonly available on telecommunications systems. To accomplish this objective, the city and the company may review the range of programming and services available to this system at three year intervals following the effective date of this franchise. In the event that the city determines that the company is not providing the full range of services and programming reasonably available on telecommunications systems in the State of Florida, the city shall provide the company with a specification of what services or programming it desires to be added to the system subject to the provisions of the Cable Communications Policy Act of 1984, as that statute may be amended from time to time. The company shall provide the additional services or programming requested by the city (subject to the provisions of the Cable Communications Policy Act of 1984) unless the company reasonably determines in good faith that the provision of such services or programming is not technically, legally, or economically feasible. Any dispute arising under Section 4 which cannot be resolved by the parties shall be submitted to arbitration under the Florida Arbitration Code F.S. 682 et seq., unless preempted by the Cable Communications Policy Act of 1984.

Section 5. The system.

(a) During the franchise term, and any extensions thereof, the company shall construct, operate, and maintain the system throughout the corporate limits of the city. No later than three years from the date upon which the city council of the City of Niceville, Florida, approves the provisions of this ordinance, the company shall have completed a rebuild/upgrade of the system. The upgraded system shall consist, at a minimum, of a 550 megahertz system, containing a channel capacity of at least seventy-eight (78) channels, utilizing fiber optic technology. The system shall also include a basic service tier of not less than eleven (11) channels. The system shall provide at least one (1) channel of each of the following services, except that the company may petition the city for a waiver of this requirement; such waiver to be granted for good cause shown, including the unavailability of such programming at a reasonable cost or the results of a subscriber survey showing lack of viewer interest.

(1) An over-the air broadcast "super station", whose city of license is outside the Niceville broadcast television market (such as WTBS Atlanta, WOR New York, or WGN Chicago);

(2) A cable service providing primarily children's oriented programming;

(3) A cable service providing primarily news;

(4) A cable service providing primarily sports programming;

(5) A cable service providing music videos;

(6) A cable service providing primarily religious programming;

(7) A cable service providing primarily country and western programming;

(8) A cable service providing primarily weather information;

(9) A cable service providing primarily public affairs programming;

(10) A cable service providing primarily feature films;

(11) A cable service providing primarily financial news;

(12) A cable service providing primarily minority-oriented programming;

(13) A cable service providing pay-per-view programming;

(14) A cable service providing primarily home-shopping programming; and

(15) A cable service providing primarily comedy programming.

(b) During the term of this agreement the city retains the right to enter into an agreement with the company to provide government access programming.

(c) The system and each component thereof shall be located, operated, and maintained so as to avoid interference with the proper use of streets, alleys and other public ways and places, with public utilities, and with the rights or reasonable convenience of property owners who adjoin any of the said streets, alleys, or other public ways and places. The location of the company's poles, lines, and equipment shall be approved by the city engineer of the city before installation. Wherever feasible to install company's lines on existing poles or in existing conduits, the city through its city engineer may require all of the company's lines and equipment to be installed underground. Where power and telephone lines are underground the company's lines shall similarly be installed underground.

(d) The company shall construct its cable system using materials of good and durable quality and all work involved in the construction, installation, maintenance, and repair of the cable system shall be performed in a safe, thorough, and reliable manner. Any municipal property damaged or destroyed shall be promptly repaired or replaced by the company and restored to serviceable condition.

(e) The company's system, poles, wires, and appurtenances shall be located, erected, and maintained so that none of its facilities shall endanger or interfere with the lives of persons, or interfere with any improvements the city may deem proper to make, or unnecessarily hinder or obstruct the free use of the streets, alleys, bridges, easements or public property.

(f) In case of any disturbance of pavement, sidewalk, driveway or other surfacing, the company shall, at its own cost and expense and in a manner approved by the city, replace and restore all paving, sidewalk, driveway or surface of any street or alley disturbed, in as good condition as before said work commenced.

(g) If the city elects to alter, or change the grade or width of any street, alley or other public way, the company, upon reasonable notice by the city, shall remove, relay and relocate its poles, wires, cables, underground conduits, manholes, and other fixtures at its own expense.

(h) The company shall, on the request of any person holding a building moving permit issued by the city, temporarily raise or lower its facilities to permit the moving of buildings. The expense of such temporary removal, raising or lowering of said facilities shall be paid by the person requesting the same, unless such person be the city, in which case such temporary removal, raising or lowering shall be at the expense of the company. The company shall have the authority to require payment in advance by any person requesting the same, other than city, and the company shall be given not less than seven days advance notice of the need for such temporary facilities changes.

(i) The company shall have the authority to trim trees upon and overhanging streets, alleys, sidewalks, and public places of the city so as to prevent the branches of such trees from coming in contact with the wires and cables of the company, all trimming to be done under the supervision and direction of the city and at the expense of the company.

(j) The company shall provide, upon request and without charge, basic service to any municipal buildings owned and operated by the city and to any public elementary or secondary school. This shall mean only an energized cable to such building from existing plant (existing cable). The cost of any internal wiring shall be borne by the institution.

(k) The system shall include interface capabilities for a character generator which may be used without charge by franchising authorities and/or civil defense for the display of public emergency alert notices on all broadcast channels.

(l) It is acknowledged by the parties to this franchise that the provision of cable television services takes place in an environment of existing federal and state legislation and regulatory authority which may change from time to time over the term of this franchise. In addition, it is further acknowledged that technological innovations, availability of programming, and practical usages of the cable television system are also likely to change over the term of this franchise. It is the intention of the city and the company to provide sufficient flexibility in the terms of this franchise in order to provide the customers of the company in the City of Niceville and its citizens with the opportunity to take advantage of legal and technological changes. To accomplish this purpose, the company and the city agree that those provisions of this franchise which may be significantly affected by changes in federal or state legislation, or by regulations pertaining thereto, or by significant changes in available technology, may be renegotiated upon written request of the city or the company to the other party.

(m) Customers who have previously paid to the company a direct payment to offset the cost of line extension to service their residence or business shall not be charged an additional charge for the extension of the rebuilt system to their residence or business location. Apart from a reasonable, one-time charge for the extension of service to a remote location as provided elsewhere in this franchise agreement, the rate charged by the company for service to the citizens of the City of Niceville shall be uniform throughout the city; however, in the event that the company is engaged in competition with another video service operator, the company may establish rates of its own choosing in the area of competition.

(n) The company shall maintain a tier of basic service in compliance with the Cable Television Consumer Protection and Competition Act of 1992, and applicable FCC rules and regulations. The initial charge for service to customers on this basic service tier shall not exceed the benchmark rate as provided by Section 623 (Rate Regulation) of the 1984 Communications Act, as amended by the 1992 Cable Act, as implemented by regulations promulgated by the Federal Communications Commission in its Report and Order of May 3, 1993, as amended, to be codified at Part 76 of Title 47 of the Code of Federal Regulations. Rate adjustments subsequent to November 15, 1993, shall be limited to (i) the price cap determined by the Gross National Product Price Index, as defined in 47 CFR 576.922 (c)--(d)(1), including additional adjustment or external costs as defined in 47 CFR 576.922(d)(2); or (ii) an amount determined by an appropriate cost of service showing by the company in accordance with rules adopted by the Federal Communications Commission, or (iii) an amount agreed upon by the city and the company. The company shall provide the city, upon the city's request, with all information necessary for the city to determine that the company is in compliance with this paragraph, including but not limited to, all information which would be required to be furnished to the city in the event that the city became certified to regulate rates and rate increases by the FCC.

(o) The company shall implement and adhere to the consumer protection and customer service standards provided by Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, and FCC Report and Order of April 7, 1993, as amended April 15, 1993, 47 CFR 576.309, as those rules and regulations may be amended from time to time.

Section 6. Compliance with laws, regulations and ordinances.

The company shall at all times during the franchise term be subject to all lawful exercise of the police power by the city and to such reasonable regulation as the city shall hereafter by resolution or ordinance provide. The construction, extension, operation, and maintenance of the system by the company shall be in full compliance with such portions of the Standard Building Code and the National Electrical Code as may be applicable and as the same may be amended and revised from time to time, and in full compliance with all other applicable laws, ordinances, rules, and regulations now in effect or hereafter adopted by the Federal Communications Commission, the city, or any other agency of the State of Florida or the United States.

Section 7. Indemnification.

(a) *Hold harmless.* The company shall hold harmless the City of Niceville, its subsidiaries or affiliates, elected and appointed officials, boards, commissions, employees, volunteers, representatives and agents from any and all claims, suits, actions, damages, liability and expenses in connection with loss of life, bodily or personal injury, or property damage, including loss or use thereof, directly or indirectly caused by, resulting from, arising out of or occurring in connection with the company's performance of this franchise, whether arising solely out of the negligence of the company or not. The company's obligation shall not be limited by, or in any way to, insurance coverage or by any provision in or exclusion or omission from any policy of insurance. The company shall also fully indemnify, defend, and hold harmless the city against any and all claims, suits, actions, liability, and judgment for damages (including but not limited to expenses for reasonable legal fees and disbursements and liabilities assumed by the city in connection therewith) arising out of any claims related to the company's operation of the system including for invasion of the right of privacy; for defamation of any person, firm, or corporation; or the violation or infringement of any copyright trademark, trade name, service mark, or patent; or any other right of any person, firm or corporation (excluding claims arising out of or relating to city programming).

(b) *Pay on behalf of the city.* The company agrees to pay on behalf of the city, as well as provide a legal defense for the city, both of which will be done only if and when requested by the city, for all claims as described in the hold harmless paragraph. Such payment on the behalf of the city shall be in addition to any and all other legal remedies available to the city and shall not be considered to be the city's exclusive remedy. These expenses shall include all out-of-pocket expenses, such as attorney fees, and shall also include the reasonable value of any services rendered by the city attorney or his assistants or any employees of the city or its agents.

(c) *Use of company facilities.* The city shall have the right, during the life of this franchise, to install and maintain free of charge upon the poles of the company any wire and pole fixtures that do not interfere with the company operations. The city agrees to indemnify, defend, and hold the company harmless from actions resulting from the city's negligence as the proximate cause of such claims.

(d) Rights of individuals:

(1) The company shall not deny service, deny access, or otherwise discriminate against subscribers, channel users, or general citizens on the basis of race, color, religion, national origin, sex. The company shall comply at all times with all other applicable federal, state, and local laws and regulations and all executive and administrative orders relating to nondiscrimination which are hereby incorporated and made part of this franchise by reference.

(2) The company shall strictly adhere to the equal employment opportunity requirements of federal, state, and local regulations, as they may be amended from time to time.

(3) No signals of a Class IV cable communications channel shall be transmitted from a subscriber terminal for purposes of monitoring individual viewing patterns or practices of the subscriber. The request for such permission shall be contained in a separate document with a prominent statement that the subscriber is authorizing the permission and full knowledge of its provision. The authorization shall be revocable at any time by the subscriber without penalty of any kind whatsoever. Such authorization is required for each type of classification of Class IV cable communications activity planned for the purpose, provided, however, that the company shall be entitled to conduct systemized or individually addressed "sweeps" for the purpose of verifying system integrity, controlling return-path transmission, or billing for pay services. Any utility meter reading service is exempted from the provisions of this subsection.

Section 8. Insurance.

Prior to commencement and until termination of this franchise, the company shall procure and maintain insurance of the types and to the limits specified herein. The term "city" as used in this section of the franchise is defined to mean the City of Niceville itself, any subsidiaries or affiliates, elected and appointed officials, employees, volunteers, representatives and agents.

The company and the city understand and agree that the minimum of insurance herein required may become inadequate during the term of this franchise. The company and the city agree that the minimum limits may be increased to reasonable amounts, as determined by the city council, upon any annual anniversary date of this franchise. With regard to the company's obligations for products and completed operations, the company shall be responsible for providing and maintaining insurance and contractual agreements for a minimum period of at least three (3) years subsequent to the city's acceptance of the product or completed operation.

Insurance shall be issued by an insurer who has a Best's rating of A or better. Unless otherwise agreed, the amounts, form and type of insurance shall conform to the following minimum requirements.

(a) *Workers' compensation.* The company shall maintain workers' compensation coverage for all workers' compensation obligations imposed by law. Additionally, coverage must include employer's liability coverage of at least $1,000,000 each person/accident, $1,000,000 each person/disease, and $1,000,000 aggregate/disease.

(b) *Comprehensive general, automobile, media, peril, and umbrella liability coverage.* The company shall purchase coverage on forms no more restrictive than the latest editions of the comprehensive general liability and business auto policies filed by the Insurance Services Office. The city shall be an additional insured and such coverage shall be at least as broad as that provided to the named insured under the policy for the terms and conditions of this contract. The city shall not be considered liable for premium payment, entitled to any premium return or dividend, and shall not be considered a member of any mutual or reciprocal company. Minimum limits of $3,000,000 per occurrence, and per accident, combined single limit for liability must be provided, with umbrella insurance coverage making up any difference between the policy limits of underlying policies coverage and the total amount of coverage required.

Comprehensive general liability coverage must be provided, including bodily injury and property damage liability for premises, operations, products, and completed operations, personal injury, advertising liability, independent contractors, and property damage resulting from explosion, collapse, or underground (x, c, u) exposures. Broad form comprehensive general liability coverage, or its equivalent, shall provide at least, broad form contractual liability applicable to this specific contract, personal injury liability and broad form property damage liability. The coverage shall be written on occurrence-type basis.

Business auto policy coverage must be provided, including bodily injury and property damage arising out of operation, maintenance, or use of owned, non-owned and hired automobiles and employee non-ownership use.

Umbrella liability insurance coverage shall be following form to the underlying insurance policy coverages. The coverage shall be written on an occurrence-type basis.

(c) *Certificates of insurance.* Required insurance shall be documented in the certificates of insurance which provide that the City of Niceville shall be notified at least thirty (30) days in advance of cancellation, nonrenewal or adverse change or restriction in coverage. The City of Niceville shall be named on each certificate as an additional insured and this contract shall be listed. Certificates shall be on the "Certificate of Insurance" form equal to ACORD 25. Any wording in a certificate which would make notification of cancellation, adverse change or restriction in coverage to the city an option shall be deleted or crossed out by the insurance carrier or the insurance carrier's agent or employee. The company shall replace any cancelled, diversely changed, restricted or nonrenewed policies with new policies acceptable to the city and shall file with the city certificates of insurance under the new policies prior to the effective date of such cancellation, adverse change or restriction. If any policy is not timely replaced, in a manner acceptable to the city, the company shall, upon instructions of the city, cease all operations under the contract until directed by the city, in writing, to resume operations. The address for certificates of insurance is:

City of Niceville
Department of Risk Management
208 N. Partin Drive
Niceville, Florida 32578

(d) *Insurance of the company primary.* The company required coverage shall be considered primary, and all other insurance shall be considered as excess over and above the company's coverage: except where the city is held to be negligent (as described in Section 7(c)), in which case the city's coverage shall be considered primary, and all other insurance shall be considered excess over and above the city's coverage.

(e) *Loss control and safety.* The company shall make a reasonable effort to detect hazards associated with the performance of the franchise obligations and endeavor to reduce or minimize such hazards.

Section 9. Line extension.

The company shall equitably and reasonably extend energized trunk cable to all areas within the limits of the city within one hundred twenty (120) days of a request by a subscriber, not already served, provided, however, in the event any subscriber is in a remote or inaccessible location, the company shall have the right to charge such subscriber for material and labor expended by the company in providing such service connection, in excess of the cost of extending service generally to subscribers without charge to them. The city council will make the final determination of whether or not a subscriber is in a remote or inaccessible location and liable for line extension charges, and such determination of whether or not a subscriber is in a remote or inaccessible location and liable for line extension charges shall be final and binding upon the company.

Section 10. Compliance with standards.

All facilities and equipment of company shall be constructed and maintained in accordance with the requirements and specifications of the National Electrical Shaft Code and such applicable ordinances and regulations set forth by the city and/or any other local, state, or federal agencies.

All working facilities, conditions, and procedures used or occurring during the company's operation, shall comply with the standards of the Occupational Safety and Health Administration, 1910 General Industry Standards.

Section 11. Company rules and regulations.

The company shall have the authority to promulgate such rules, regulations, terms and conditions governing the conduct of this business as shall be reasonably necessary to enable the company to exercise its rights and perform its obligations under this franchise, and to make every reasonable effort to assure an uninterrupted service to each and all of its customers. Provided, however, that such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of federal, state, and local laws.

Section 12. Approval of transfer.

The company shall not sell or transfer its system or control thereof to another, or transfer any rights under this franchise to another without the consent of the city. Such consent shall not be granted until the city has examined the proposed assignee's legal, financial, technical, character, and other qualifications to construct, operate, and maintain a telecommunications system in the City of Niceville, Florida, and has afforded all interested parties notice and an opportunity to be heard on the question. Consent of the city shall not be arbitrarily refused provided that the proposed assignee possesses the requisite qualifications and agrees in writing, to comply with all provisions of the franchise ordinance. A transfer of 20% or more of the voting securities of a corporate grantee to a person not presently a stockholder shall be deemed to be a transfer of control. A transfer of less than 20% of the voting securities of a corporate grantee which results in the transfer of voting control must comply with the provisions of this section.

company and after affording the company an opportunity to be heard, may assess the company a civil penalty in any amount of money equivalent to and representing the losses, inconvenience or other damages sustained by the city and the subscribing public on account of said violation, omission or noncompliance, or the city may terminate the franchise agreement with the company. In the event that the city should assess a civil penalty against the company hereunder, the same shall be paid by the company to the city within thirty (30) days of assessment thereof, and failure of or by the company to pay said civil penalty to the city as prescribed herein shall constitute grounds for termination of the franchise granted to the company by the city. The company shall be responsible for payment of all attorney's fees and court costs of proceedings undertaken according to this section if the company is assessed a civil penalty according to this section.

Section 15. Franchise fees.

(a) The company shall pay to the city of Niceville, Florida, each year during the life of the franchise a franchise fee in the amount of five percent (5%) of gross revenues derived from the system within the City of Niceville, Florida limits and said payments shall be made monthly. All monthly payments shall be due thirty (30) days after the close of the affected month.

(b) The City of Niceville shall have the right to inspect the company's records showing the gross revenues from which its franchise payments are computed and shall also have the right of audit and recomputation of any and all amounts paid under the ordinance. No acceptance of payment shall be construed as a release or as an accord and satisfaction of any claim the city may have for further or additional sums payable under this ordinance or for the performance of any obligation hereunder.

Section 16. Records and reports.

The city shall have access at all reasonable hours to all of the company's plans, contracts, and engineering, accounting, financial statistical, customer, and service records relating to the property and the operation of the company and to all other records required to be kept hereunder. A quarterly report showing gross revenues received by the company from its operations within the city during the preceding calendar quarter shall be filed with the city clerk in duplicate within thirty (30) days after the end of each calendar quarter.

Section 17. Local office; complaint procedures.

(a) During the franchise term, and any renewal thereof, the company shall maintain within the city a local business office or agent for the purpose of receiving and resolving all complaints regarding the quality of service, equipment malfunction, and similar matters. The provisions of this section shall be complied with if the company maintains a local business headquarters office within ten (10) miles of the principal coordinates of the city, which office may be reached by local, toll-free telephone call, and provides the city manager's office with the name, address, and telephone number of a person who will act as the company's agent to receive inquiries or complaints from subscribers during normal business hours. The company shall provide a reasonably sufficient number of incoming telephone lines for the purpose of receiving customer communications without excessive delay, and these telephone lines shall be in operation continually, force majeure excepted. Any complaints from subscribers shall be investigated and acted upon as soon as possible, but at least within the next two (2) business days following their receipt. The company shall keep a maintenance service log which will indicate the nature of each service complaint, the date and time it was received, the disposition of said complaint, and the time and date thereof. This log shall be made available for periodic inspection by the city.

(b) The company shall by appropriate means, such as a card or brochure, as subscribers are connected or reconnected to the system, and thereafter at intervals of not more than one (1) year, furnish information concerning the procedures of making inquiries and/or complaints are to be addressed. The city appoints its city manager or his designee, 208 N. Partin Drive, Niceville, Florida 32578, as responsible for implementation of the complaint procedures and continuing administration of the franchise.

(c) Responsibility for the administration of this franchise and for the resolution of all complaints against the company regarding the quality of service, equipment malfunctions, and similar matters, is hereby delegated to the city manager or his designee of the city who is empowered, among other things to adjust, settle, or compromise any controversy arising from operations of the company either on behalf of the city or any subscriber, in accordance with the best interest of the public; provided that any person aggrieved by a decision of the city manager or his designee may appeal the matter to the council for hearing and determination. The council may accept, reject or modify the decision of the city manager, and may adjust, settle, or compromise any controversy arising from the operations of the company under this franchise. No adjustment, settlement, or compromise, whether instituted by the city manager or his designee or by the council shall be contrary to the provisions of this ordinance, and neither the city manager or his designee nor the council, in the adjustment, settlement, or compromise of any controversy shall have the right or authority to add to, modify, or delete any provision of this ordinance except pursuant to the provisions of Section 625 of the Cable Communications Policy Act of 1984/1992.

Section 18. Periodic reviews during franchise term.

The city may require periodic review of the franchise at three (3) year intervals. Review shall consist of company's performance evaluation, company attitude, state of the art, and any other provision of this ordinance that the city may deem advisable. During the term of the franchise, the city may, in its discretion and at its option, retain a consultant in order to assist the city in reviewing the operation by the city to the company, the company shall bear the cost of the consultant which the city may retain; provided that during the term of this franchise the company shall not be required to pay a total of no more than five thousand dollars ($5,000.00) toward this cost.

Section 19. Right of acquisition by the city.

(a) In the event the franchise is cancelled by the city because of a material breach or default by the company or the franchise is not renewed upon expiration, the system shall, at the election of the city, become the property of the city at a cost which shall be determined by the fair market value of the system as a going concern, including physical assets and intangibles which shall not include any valuation for goodwill. Such fair market value, if not agreed upon, shall be determined by a panel of three (3) arbitrators, one to be appointed by the city, one to be appointed by the company, and the third to be selected by the two (2) arbitrators. The expenses of the arbitration, including the fees of the arbitrators, shall be borne by the city and the company in such a manner as the arbitrators provide in their award. The determination of a majority of the arbitrators shall be binding on the city and the company. The company shall make it a condition of each franchise and each contract entered into by it with reference to operations under this franchise that the franchise or contract shall be subject to the exercise of this option by the city and that the city shall have the right to succeed to all privileges and the obligations thereof at its option.

(b) In the event that the company determines to divest itself of an ownership interest in the system which is the subject of this franchise, the company shall provide timely notice to the City of Niceville of its intention. The city shall have the right to communicate to the company the city's desire and intention to purchase the system from the company at an equitable price, at fair market value. The company shall give due consideration to the city's bid for purchase and will not arbitrarily refuse to accept the city's bid absent a bona fide business reason.

Section 20. Severability.

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section 21. Ordinance repealed.

Ordinance No. 438 is repealed and replaced by this ordinance. All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 22. Effective date.

This ordinance shall take effect immediately upon its passage by the City Council.

ADOPTED in Session this 3rd Day of November, 1994.

/s/ Randall Wise

Mayor

ATTEST:

/s/ George H. Ireland

City Clerk

Q

RESOLUTION 99-15

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DESTIN APPROVING THE TRANSFER OF COX COMMUNICATION'S CABLE SYSTEM FROM TWC CABLE PARTNERS, INC. TO COX COMMUNICATIONS GULF COAST, LLC UPON COX COMMUNICATIONS GULF COAST, LLC BECOMING A SIGNATORY ON FRANCHISE ORDINANCE NO. 316; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council is required to expressly approve the transfer of its cable television franchise ordinance, Ordinance No. 316, to any other person or corporation than the original franchisee, TWO CABLE PARTNERS, INC.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Destin does hereby approve the transfer of cable communications franchise, Ordinance No. 316, to COX COMMUNICATIONS GULF COAST, LLC and states as follows:

1. Authority: Section 22-3 (m) (1) of Ordinance No. 315 requires that all transfers of any cable communications franchise be expressly approved by the City Council.

2. SECTION 1. That the City Council of Destin hereby expressly approves the transfer of the TWC Partners, Inc. cable communications franchise ordinance, Ordinance 316, to COX COMMUNICATIONS GULF COAST, LLC. The City Council's approval of this transfer is expressly conditioned upon the complete acceptance by COX COMMUNICATIONS GULF COAST, LLC of all terms, conditions and limitations imposed by Ordinance 316 as indicated by its execution of the signatory page attached to this resolution.

3. SECTION 2. This resolution shall become effective upon adoption by the City Council, signature of the Mayor, and the execution of the attached signatory page.

ADOPTED THIS 19th DAY OF APRIL, 1999

Kenneth B. Beaird, Mayor

ATTEST:

Larry Rubenstein, City Manager

Carolyn Lee Garrett, City Clerk

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ROUTING SLIP

ACTION OFFICE:

REVIEW, INITIAL & ROUTE:

ATTY ✓ LIB

CC ✓ MAYOR

CLK ORIGINAL

CM ✓

FIN

HM

RP

NOTES:

WARNER CABLE
COMMUNICATIONS INC.

400 Metro Place North
Dublin, Ohio 43017
P 614/792-7000

RECEIVED
FEB 03 1992
CITY OF DESTIN

January 31, 1992

Mayor Jimmy Vaughn
City of Destin
P.O. Box 399
Destin, FL 32541

Dear Mayor Vaughn:

As discussed, I am pleased to confirm that Warner Cable Communications Inc. and Cox Cable Communications are now parties to various agreements which, pending approval of the Destin City Council, will have Cox assuming day-to-day management of cable service to the residents of Destin. We believe that Cox Cable has established a strong and positive reputation for quality in the delivery of cable service in the State of Florida through its over ten years of service in Pensacola, Ocala and Gainesville. The Cox presence in Destin will sustain our focus upon improvement in customer service, technological innovation and programming creativity.

The change in day-to-day management will require neither an interruption in service nor adverse impact of any kind in the operation of the Destin system. However, our franchise may require your approval before the transaction can be concluded. If you believe that such approval is required, we would appreciate the consideration and prompt adoption of the accompanying resolution. If no approval is required, please let us know.

The change in day-to-day management described above will be reached through a series of transactions which also involve the exciting developments announced earlier by Time Warner, Warner Cable's parent company. The description of the transaction set forth below is intended, in part, to notify you (as required by the franchise) of that portion of the transaction which involves only Time Warner; even though that phase of the transaction requires no action or approval by the City Council. It is also intended to facilitate your consideration of our request for approval of the transfer of day-to-day control of the Destin system to Cox.

Pursuant to the various agreements alluded to above, it is now contemplated that Warner Cable will transfer the Destin franchise to Time Warner Entertainment Company L.P. (TWE), a yet to be formed affiliate of Warner Cable, commonly controlled by Time Warner. TWE will own, or have an interest in, all of Time Warner's filmed entertainment (Warner Bros.), television production (HBO) and the cable television businesses (Warner Cable and ATC). Time Warner, through subsidiaries, will be managing general partner of TWE with full management, operational and creative control over TWE's cable and other businesses. Warner Cable and ATC will continue as operating divisions of TWE. TWE, which will have a total capitalization of $20 billion, will issue 6.25% limited partnership interests to each of C. Itoh and Toshiba for their investment of $1 billion in TWE. The remaining 87.5% of TWE will be owned by Time Warner which will also have a preferred equity interest in the new company which the parties have valued at approximately $5 billion. Under the provisions of Section 12 of the franchise agreement, this transfer of the franchise from Warner Cable to TWE, its affiliate, requires no approval by the Destin City Council.

To achieve the assumption of day-to-day operating control of the Destin system by Cox as described above, TWE will contribute the franchise, as well as all of the cable assets and liabilities of the Destin system, to an existing partnership (known as the "SI Partnership"), formed in 1984 by Cox Cable and Gilbert Communications Co., L.P. ("Gilbert"), to own and operate the cable system in Staten Island New York. TWE will receive a 33.3% partnership interest in the SI Partnership which, following the immediate redemption of the Gilbert partnership interest as required by the applicable agreements, will rise to 50%. This will leave only TWE, (through its Warner Cable division) and Cox as General Partners of the SI Partnership. Thereafter, the name of the partnership will be changed to TWC Cable Partners. As part of this transaction, Cox will become manager of the Destin system. In turn, a division of TWE will assume management control of the cable system located in Staten Island, New York.

It is currently anticipated that the TWE transaction will be completed prior to the TWC Cable Partners transaction sometime after April 10, 1992. The end we seek, however, is the Cox assumption of day-to-day control of the Destin system. And, as stated above, it is only that phase of the transaction (and achieving it through the TWE transfer of the franchise to the SI Partnership in exchange for a 50% partnership interest to make it become TWC Cable Partners) which requires approval under Section 12 of the franchise. TWC Cable Partners and Cox, of course, will be responsible for all existing obligations under the franchise.

We will contact you within the next few days to discuss any questions you may have.

Thank you for your cooperation.

Yours truly,

WARNER CABLE COMMUNICATIONS INC.

Don Jensen
General Manager

DJ/llb

cc: Barry Elson
Jim Gray
Spencer Hays
Paul Jones
Terry Wingfield

RESOLUTION 92-04

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DESTIN CONSENTING TO THE TRANSFER OF THE FRANCHISE AND RELATED CABLE TELEVISION SYSTEM TO ONE OR MORE OF THE SUBSIDIARIES OF TIME WARNER COMMUNICATIONS, INC., INCLUDING TIME WARNER ENTERTAINMENT COMPANY, TO COX AND THE GENERAL PARTNERSHIP.

WHEREAS, Warner Cable Communications Inc. ("Warner Cable") is the holder of a cable television franchise ("the Franchise") for the City of Destin, Florida; and

WHEREAS, Warner Cable has entered into a certain agreement with Staten Island Cable, Cox Cable New York ("Cox"), and Gilbert Communications Co., L.P., ("Gilbert") known as the Exchange and Partnership Reorganization Agreement pursuant to which the parties intend to reorganize a general partnership known as the "SI Partnership"; and

WHEREAS, Warner Cable is a wholly-owned subsidiary of Time Warner,Inc., ("Time Warner"), a widely held New York Stock Exchange company which intends to create a new limited partnership entity comprised f the assets and operations of its filmed entertainment, programming and cable television businesses, which entity shall be known as Time Warner Entertainment Company, L.P. ("TWE"); and

WHEREAS, Time Warner intends to offer minority limited partnership interests in TWE to strategic partners in TWE, including Toshiba Corporation and C. Itoh and Company; and

WHEREAS, Time Warner will retain majority ownership as well as operating and management control of TWE; and will operate TWE as a controlled subsidiary of Time Warner consisting of the assets of Warner Cable, American Television and Communications Corporation ("ATC"), Lorimar Telepictures ("Lorimar"), Home Box Office Inc. ("HBO"), and Warner Bros. Inc. ("Warner Bros.") including rights and obligations of Warner Cable under the Franchise and the SI Partnership; and

WHEREAS, Warner Cable and ATC will continue to exist as operating divisions of TWE, with the existing management structure surviving; and

WHEREAS, TWE intends to transfer the Franchise to the SI Partnership in exchange for a 33.3% ownership interest therein, which interest shall increase to 50% immediately following redemption of the SI Partnership interest owned by Gilbert; and

WHEREAS, the SI Partnership will thereafter become known as TWC Cable Partners and become responsible for all of the existing obligations under the Franchise; and

WHEREAS, following the redemption of the Gilbert ownership interest in the SI Partnership, Cox will own a 50% interest therein and will assume day-to-day management control of the Franchise and be principally responsible for day-to-day compliance with all of the obligations under the Franchise.

NOW, THEREFORE, be it resolved that the transfer of the Franchise and related cable television system from the grantee either directly or through one or more subsidiaries of Time Warner, including TWE, to Cox and the SI Partnership (which will thereafter be known as TWC Cable Partners) is hereby authorized and consented to in all respects, conditioned upon filing with the City, by TWC Cable Partners, its notice of acceptance of its responsibilities to perform under the franchise.

This resolution shall take effect and be in force from and after the earlier of the date of the final passage hereof or the earliest time permitted by law.

RESOLVED THIS 3RD DAY OF MARCH, 1992.

James W. Vaughn

JAMES W. VAUGHN
MAYOR

ATTEST:

Philip Cook

PHILIP COOK
CITY MANAGER

Carolyn Lee Garrett

CAROLYN LEE GARRETT
CITY CLERK

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Attachment R
3rd Affidavit of Michael R. Dunn

R

Pricing for Utility Pole Attachments and Conduit Access: Recommended Analytical Guidelines

A Report Prepared in Response to:
The Federal Communications Commission's
Notice of Proposed Rulemaking, CS Docket No. 97-98,
In the Matter of Amendment of Rules and
Policies Governing Pole Attachments

Prepared by:
Reed Consulting Group
140 South Lake Avenue
Suite 340
Pasadena, CA 91101
(818) 432-5280

and

200 Wheeler Road
Burlington, MA 01803

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About Reed Consulting Group

Reed Consulting Group ("RCG") is a management consulting firm that specializes in the analysis of competitive energy markets, regulatory and litigation support, industry restructuring, planning and organizational studies and specialized information services. RCG's clients include electric and natural gas utilities, energy marketers/retailers, gas pipelines, energy project developers, energy producers, large energy consumers, banks, financial institutions and law firms. RCG's staff members have prepared and presented testimony in hundreds of regulatory and civil proceedings before more than 40 different federal and state agencies and courts. Much of this work has involved electric rate proceedings that focused on cost-of-service, cost allocation, rate of return and rate design issues. Additionally, a significant amount of RCG's work has been in the area of market power and electric industry restructuring, including market-based and performance-based ratemaking, divestiture, stranded costs and other issues related to industry deregulation. As part of this work, RCG's principals and consultants have testified in precedent-setting cases involving the adoption of market-based rates for regulated gas and electric services and the establishment of open-access rules and rate design for electric utilities.

Introduction and Findings

Electric utilities, including American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Florida Power & Light Company and Northern States Power Company provide third parties access to their distribution poles and, in certain circumstances, to their ducts, conduits and rights-of-way, for purposes of attaching and laying cable and telecommunications wire. RCG was been asked to comment on the appropriate pricing standards that should apply to such access. Accordingly, this report discusses the salient analytical principles that should guide pricing decisions for pole attachments and conduit access (the latter is intended to encompass conduits, ducts and rights-of-way).

In determining the appropriate pricing standard, one cannot be directed solely by theoretical economic principles. The choice of pricing framework must be guided by economic principles and a thorough understanding of the market and its participants. In addition, the choice of a pricing framework for these regulated resources should be made in the historical and prospective context of the pricing for other regulated goods and services, otherwise one cannot benefit from the existing and evolving corpus of knowledge acquired over the years by the various regulatory bodies that have dealt extensively with these issues.

As a means of better understanding the relationship among electric utilities, cable and telecommunications companies (the latter two being the principal market participants seeking access), the next section, Section I, discusses and provides a broad overview of the cable and telecommunications industries. Following this discussion, Section II provides a historical perspective on the pricing for pole attachments and conduit access. In this same section, the report presents a brief historical overview of other regulated industries that can be used as an analytical benchmark with which to evaluate pricing for pole attachments and conduit access. In Section III, the dominant pricing paradigms that have emerged over the years are discussed. These paradigms serve as a useful continuum that can be used to assess the appropriate pricing framework for this inquiry. Section IV discusses the basic economic principles that should guide the choice of pricing framework for any regulated service.

Sections V-VII discuss the salient institutional and economic realities that must be recognized in the current analysis. Specifically, Section V begins with a discussion of the Telecommunications Act of 1996 (the "1996 Act"), which provides the proper backdrop for understanding congressional intent in the area of pricing for these services. This section also clearly identifies the intent of the Federal Communication Commission (the "FCC" or the "Commission") in the area of pricing. The FCC has clearly stated its economic objectives in a recent pricing decision, the outcome of which is particularly relevant for poles and conduits. Sections VI and VII of this report discuss the proper analytical context for pole attachments and conduit access. Section VI provides the "first best" solution, while Section VII provides the alternative "second best."

Findings

Four critical points are drawn from the background information included in Sections I-V. It must be recognized that:

- *The cable industry and competitive telecommunications industries can no longer be considered in their infancy. They are vast, well-financed and formidable.*
- *The regulatory motivation underlying pricing for poles and conduits prior to 1996 no longer has any prospective relevance.*
- *Across most, if not all, regulated industries, there has been a clear and unambiguous movement away from traditional embedded cost-of-service ratemaking towards more market-based, or at least market-emulating, pricing standards.*
- *The 1996 Act clearly established competitive market solutions as its goal. This goal has been embraced by the FCC in its pricing for Interconnection and Unbundled Elements. The FCC's decision in this case is particularly relevant for poles and conduits.*

Based on the above findings, adherence to guiding economic principles and a recognition of the market and market participants, the following are RCG findings:

- *In general, regulatory oversight can be justified in a number of cases in which markets* *fail. However, in the present case, concerns over potential market power are the only relevant justification for regulation of pole attachment rates and conduit access.*

- *A proper evaluation of whether electric utilities possess market power cannot rely solely, or even predominantly, on a "structural" analysis where the size of firms and industry concentration guide conclusions. Even if employed, a structural analysis cannot be limited to poles and conduit resources. A thorough accounting of available alternatives to poles and conduits must be conducted.*

- *Electric utilities do not own "essential facilities." Poles and conduits are not "bottleneck" facilities as there are alternatives. Electric utilities provide electric service over distribution resources; they do not, with few exceptions, compete directly with cable and telecommunications companies.*

- *The bargaining relationship between electric utilities and cable and telecommunications companies is that of bilateral negotiation. In the absence of market power by one party in bilateral negotiation, market-based negotiated rates should be allowed.*[1]

- *A determination as to whether market-based pricing is appropriate in bilateral negotiation must evaluate each party's bargaining strength. This evaluation must include the alternatives available and each party's underlying bargaining motivation.*

- *Cable and telecommunications companies have alternatives to the electric utilities' poles and conduits. The electric utilities have no alternatives to resell these resources. Both parties are financially and economically sophisticated with equal bargaining strength. The electric utilities have no motivation to restrict access and, in fact, as a result of restructuring in their own industry, are highly motivated to reduce electric distribution costs through successful marketing of pole and conduit space.*

- *Pricing for electric utility pole attachments and conduit access should be determined through market negotiation.*

- *In the absence of market-based negotiation, the FCC should adopt a cost-based pricing framework based on replacement costs of investment. Replacement cost is consistent with economic theory and previous FCC orders. Absent employing replacement cost, significant market distortions will result.*

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[1] *As discussed on page 36 of this report, we recognize that the FCC does not have the authority to allow negotiated rates under Section 224(d). However, Section 224(e), which governs pricing in the post-2000 market, anticipates a negotiated pricing framework. The market evaluation and subsequent recommendation were included in this report because of the statutory intent of Section 224(e) and the usefulness of such an evaluation to the Commission's deliberations under Section 224(d).*

Section I. The Cable and Telecommunications Industries

This section briefly reviews how the cable and telecommunications industries have evolved. This overview is useful for two reasons. First, it serves as a backdrop for the discussion in the next section on the history and evolution of pricing for poles and conduits. Second, it provides a particularly useful framework for the discussion in Section VI, which presents the appropriate pricing framework for pole and conduit access.

The evolution of the cable and telecommunications industries is best viewed across three periods that are separated by legislative mandates that influenced the pole attachments and conduit access market. These three periods, (1) pre-1978; (2) 1978 to 1996; and (3) post-1996, recognize the impact on the industry of the Pole Attachment Act of 1978 and the 1996 Act.

A. Pre-1978

1. The Cable Industry

The cable industry prior to 1978 was for all intents and purposes in its infancy. Community antenna television ("CATV") was developed in the 1940s to serve communities that, due to terrain or physical distance, were unable to receive conventional television signals. The concept was simple: CATV companies would establish antennas in areas where the broadcast signal was strong and relay that signal via cable to their subscribers.[2]

Despite technological advances, CATV was adopted slowly. In the 1950s, cable systems in 70 communities met the needs of approximately 14,000 subscribers. Throughout the 1960s, the industry expanded the capacity of its cable systems from a few to nearly 20 channels. Such technological improvements continued, and by the early 1970s, CATV could transmit over 100 channels. However, the significant advances in technology were not met with significant customer growth. After almost 30 years of existence, the cable industry still

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[2] *Telephony and Cable Television,* Chapter 14.

served only four million subscribers.[3]

In the early 1970s, growth remained stagnant as a result of low demand and the high costs necessary to serve new areas. Growth in the cable industry remained dormant until the mid-1970s, when subscribers increased with the advent of offerings such as Home Box Office ("HBO"). Witnessing the success of HBO, other pay cable programmers entered the market. In 1978, the cable industry had grown to 13 million subscribers and 3,875 systems.[4]

2. The Telecommunications Industry

Prior to 1978, the telecommunications industry was not as much an industry as it was one company, American Telegraph & Telephone Company ("AT&T"). Although other independent telephone companies provided service in specific areas, AT&T was, for all practical purposes, *the* U.S. telephone company. It was firmly entrenched in all aspects of the business and enjoyed the status of a protected monopoly.

Although a protected monopoly prior to 1978, some inroads were made into AT&T's market. For example, in the mid-1970s, the FCC allowed some independent companies the right to directly connect their equipment to AT&T's telephone network. Most notable in this time frame were the inroads achieved by MCI Communications Corp. ("MCI"). In 1969, MCI petitioned the FCC and was allowed to provide private line service between Chicago and St. Louis. By the late 1970s, MCI won the right to offer "switched" long-distance service in direct competition with AT&T.[5] However, full-fledged competition between MCI and AT&T and, most importantly, the arrival of a full slate of competitive telecommunications companies did not take place until the 1980s.

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3 *Ibid.*, p. 690.
4 U.S. Department of Commerce, *Statistical Abstract of the United States*, 1996, p.567.
5 Standard & Poors, *Industry Surveys: Telecommunications/Wireline*, September 12, 1996, p. 17.

B. 1978-1996

1. The Cable Industry

By far, the industry's most explosive growth occurred after 1978. From 1978 to 1996, the number of cable subscribers increased from 13 to over 60 million. Similarly, the number of cable systems grew from 3,875 to over 11,000. The expansion during this period occurred primarily because of the industry's transformation from an antenna relay service to a multi-channel programming service. An industry that started out providing residents in remote locations access to conventional broadcast signals now offered video programming from local and distant broadcast stations, local cable-oriented commercial programming, public, educational and government non-commercial programming, and non-broadcast cable networks. These enhanced service offerings led to a tremendous expansion in the number of subscribers as well as an enormous increase in the penetration of CATV. As of 1977, the percentage of cable subscribers relative to the number of homes with television was barely 16.0%. As of 1996, the industry's penetration was an astounding 65%.[6]

Throughout this period, the cable industry's mantra was that competition required companies to vie for and obtain exclusive programming rights. By the late 1980s, the industry was spending well over one-third, roughly $6 billion, of what the large networks, ABC, CBS and NBC, were spending on programming.[7] As a means of comparison, the entire industry generated total revenues of only $345 million in 1970.[8] The meteoric rise in programming expenditures mirrored the industry's overall financial profile. In 1980, the industry generated approximately $2.5 billion in revenues. As of 1995, the industry generated revenues of $25.1 billion, almost a ten-fold increase.[9]

As the cable industry grew from a small antenna relay service to a major provider of programming, the character of the typical CATV company changed drastically. One industry

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6 Standard & Poors, *Industry Surveys: Broadcasting and Cable*, August 1, 1996, p. 13.

7 U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, June 1988, p. 13.

8 U.S. Department of Commerce, *Statistical Abstract of the United States, op. cit.*

9 *Ibid.*

feature over this period best illustrates this dramatic alteration: the increase in size of the CATV provider. The data provided at the beginning of this section illuminate this fact. As indicated, the number of subscribers grew from 13 to 60 million from 1978 to 1995 (a 4.6-fold increase), while the number of cable systems increased from 3,875 to over 11,000 (a 2.8-fold increase).[10] These data reveal an increase in the size of the average CATV provider and an increase in industry concentration.

There are a number of logical explanations for why the average CATV provider has become much larger and the industry has become more concentrated. First, economies of scale are associated with cable system ownership. CATV firms incur fairly large fixed costs such as capital, financing and overhead, that are independent of the number of subscribers. Therefore, by increasing the size of the firm, these fixed costs can be spread out over a larger set of customers, thus reducing per customer costs. Second, a CATV provider is motivated to become larger by the desire to increase its bargaining power. For example, data in the mid-1980s suggested that TCI, the largest cable operator, paid $0.90 per subscriber for HBO, while a smaller cable operator paid as much as $5.00 per subscriber.[11] As a result of economies of scale and the quest for added bargaining power, the typical cable company in 1996 in no way resembled its counterpart 20 years ago. The typical cable company in 1996 was large, established, financially sound and a formidable bargaining agent.

2. <u>The Telecommunications Industry</u>

In the 1978-1996 time frame, the pivotal year for the telecommunications industry was 1984. In 1984, as a result of a 1974 lawsuit filed by MCI and the Justice Department, AT&T was forced to divest its regional operating companies. The divestiture ushered in a new era for the industry in which deregulation and competition emerged as guiding forces. Much like the cable industry described in the last section, the telecommunications industry

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10 *Ibid.*

11 U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, *op. cit.*, p. 80.

throughout this period experienced growth and a transformation in the type of firm doing business. Specifically, this era gave rise to the large, well-financed telecommunications companies observed today which negotiate with the electric utilities for pole and conduit access.

The more competitive environment brought about by relaxed regulation and the divestiture of AT&T certainly gave rise to the competitive long-distance providers we see today. In addition to these types of competitors, this period also saw the rise in competitive access providers ("CAPs") and competitive local exchange carriers ("CLECs"). These types of companies have arisen as the principal competitors to the incumbent local exchange carriers ("ILECs"). The latter include the seven regional Bell operating companies, their subsidiaries, as well as other large independent local exchange carriers.

The first CAPs were established in the mid-1980s to serve increasing demand for telecommunications services by business, finance, government, education and health care entities. Industry sources estimate that the voice traffic of such end-users increased at a rate in excess of 7% per year.[12] Significant improvements in technology also stimulated growth in CAPs. The rapid development of fiber optic and digital electronics encouraged growth in cost-effective alternatives to the monopolistic local exchange carriers.

The growth in CAPs and CLECs from 1978 to 1996, while robust, was constrained as a result of regulatory prohibitions on the services they could offer. When the first CAP networks were built in 1980 they could compete only for the approximately $8.1 billion special access and private line services markets. This represented less than 10% of the $97.1 billion local exchange market. In 1994, as a result of the FCC's Interconnection Decisions, which allowed CAPs to provide Collocated Special Access, Collocated Switched Access Transport and Switched Access Termination services, CAPs were allowed to compete for an

[12] Annual Report of Brooks Fiber Properties, May 2, 1996, p. 28.

additional $12.4 billion portion of the market.[13]

C. Post-1996

1. The Cable Industry

The cable industry's growth will most likely continue. In 1996, the industry's subscriptions and market penetration reached all time highs.[14] The industry is offering more channels and a greater number of individual program services than at any other time. The industry's financial performance continues to track an extremely favorable trajectory. As of early 1996, the industry was achieving double-digit growth in total revenues, premium-service-offerings revenues and advertising revenues. Capital expenditures and the number of mergers and acquisitions appear to be increasing.[15] The growth in mergers and acquisitions highlights the increasing industry concentration that was observed over the last 20 years. It is clear that the average cable company is, and is expected to be, a large, well-established and financially secure firm.

The following table lists the top 15 cable companies, their 1995 cable services revenue, customer subscriptions and cash flow.[16]

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13 *Ibid.*, p.42 (expressed in 1994 dollars).
14 Federal Communication Commission, CS Docket No. 96-133, Third Annual Report, pp. 10-18.
15 *Ibid.*
16 *Ibid.*, p. 122.

1995 Cable Industry Subscribers, Revenue and Cash Flow

Company	Subscribers	Revenue (mil.)	Cable Cash Flow (mil)
TCI Communications, Inc.	12,494,000	4,936.000	2,081.800
Time Warner	9,769,000	3,743.440	1,549.000
Continental Cablevision	4,066,795	1,695.263	705.272
Comcast	3,407,000	1,454.932	718.455
Cox Communication	3,248,759	1,287.016	510.998
Cablevision Systems	2,061,200	905.155	392.416
Viacom	1,179,500	444.400	182.900
Marcus Cable	1,154,718	325.414	173.597
Century Communications	1,100,000	349.641	177.210
Cablevision Industries	1,041,768	432.212	203.133
Adelphia Communications	1,002,760	390.413	204.145
Jones Partnerships	902,345	391.772	122.852
Lentest Communications	596,366	232.155	115.361
TCA Cable TV, Inc.	574,473	200.867	99.982
Intermedia Partners IV	554,000	211.800	87.000
Total for Industry	62,100.000	24,456.137	10,625.139

As can be seen from the above table, the size and financial strength of the average cable company is formidable.

It must also be noted that while franchised cable systems are the primary distributors of multichannel video programming, alternative technologies are growing as well. Such alternative technologies include direct broadcast satellite, wireless cable and satellite master antenna television. The market for these alternatives now represents 11% of total subscriptions for multichannel video programming and has been growing at an average of 22% each year since 1990.[17] The growth in these alternative technologies has not, however, been at the expense of traditional cable systems which, as discussed above, continue to enjoy robust growth rates.

2. The Telecommunications Industry

The 1996 Act effectively removed the remaining barriers to entry in the local exchange

17 *Ibid.*, p. 5.

markets by CAPs and CLECs as well as other market participants. Thus, the entire local exchange market is opened to competition.

Today, the CAPs and CLECs are not the only companies that have indicated an interest in the local exchange markets. In addition to the CAPs and CLECs, long-distance carriers, cable television companies, microwave carriers, wireless telephone system operators and private networks are now vying for market share.

Of the firms listed above, the CAPs and CLECs are clearly among the firms requesting access to the poles and conduits of electric utilities. The size and financial strength of these firms have certainly grown over the years and appear to continue on an upward trajectory. The table below provides a cross-section of the types of firms in the industry.[18]

Company Name	Revenues (000's of $)	Assets (000's of $)
American Communications Services Inc.	3,415	223,600
GST Telecommunications	41,299	301,701
ICG Communication	169,094	939,351
IXC Communications, Inc.	203,761	459,151
MFS Communications Co., Inc.	1,115,006	12,550,329
Midcom Communications, Inc.	40,827	79,923
Murdock Communications Corp.	8,165	7,479
Systems Communications, Inc.	2,985	21,546
Teleport Communications Group	267,700	2,050,097
WinStar Communications, Inc.	68,048	290,223

Although not as large as the cable companies listed previously, the companies listed above certainly cannot be considered small by any measure. They are relatively large and well-established companies. These firms, however, are not the only potential set of companies that can seek access to the poles and conduits of electric utilities. In addition to the cable companies already described, long-distance carriers and incumbent local exchange carriers must also be included in the set of firms desiring access. It is true that in many cases long-distance carriers

[18] Source: annual reports, press releases, forms 10-K.

and incumbent local exchange carriers can simply rely on their own facilities. However, in the deregulated environment created by the 1996 Act, these firms are likely to be looking beyond their traditional borders and markets. To the extent these firms attempt to compete in other markets, which they are doing and will continue to do, they will require access in some cases to the poles and conduits of electric utilities. There is no question that, for example, AT&T, MCI, the regional Bell operating companies and their subsidiaries are vast, well-financed organizations. For example, in 1994, the annual revenue of the smallest of these companies, Pacific Telesis, was over $9 billion.[19] As a means of comparison, the annual revenue for the largest electric utility in the country, Pacific Gas & Electric, was $8 billion.[20]

One final note regarding the growth of telecommunications companies needs to be made before moving to the next section. The growth in CAPs, long-distance companies, etc. was achieved without mandated access and in the absence of a regulated rates. The 1978 Act applied to cable companies, *it did not apply to telecommunications companies*. Until the 1996 Act, there was no obligation on the part of the electric utilities to provide pole or conduit access to telecommunications companies. Access was provided only on the basis of arm's-length negotiations. Nonetheless, these companies have flourished and matured and today have major business operations.

Section II. The History and Evolution of Pricing for Poles and Conduits

This section provides a general overview of the rationale underlying the regulation and pricing for poles and conduits and discusses what has occurred in other regulated industries. The pricing for regulated services has indeed evolved. A historical perspective is often times useful when contemplating the appropriate future pricing frameworks that should be adopted. The discussion in this section is separated into the same three times periods used in the previous section: (1) pre-1978; (2) 1978-1996; and (3) post-1996.

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19 Standard & Poors, *Industry Surveys: Telecommunications/Wireline*, *op. cit.*

20 Utility Data Institute, *Pocket Guide to U.S. Electric Utilities*, Fourth Edition, p.13.

A. Pre-1978

The genesis of pole and conduit access pricing regulation can be traced to the early disputes between telephone and cable companies. In the early years of the telephone and cable industries, the Bell System negotiated fees for pole attachments with cable companies. In the early 1960s, however, the Bell System began to perceive cable companies as potential competitive threats in that cable companies would gradually capture the market for video, data and ultimately voice transmission. Based on this concern, the Bell System began restricting the type of services that could be delivered over any cable attached to its poles. In addition, the Bell System raised the rates its affiliates charged for pole attachments and restricted the number of cable companies that were allowed to attach to its poles.[21]

At the same time these events were occurring, independent telephone companies that were not subject to the legislative restrictions imposed on the Bell System (which prevented the Bell System from providing cable services) began providing cable services. The independents became even more restrictive than the Bell System. At times, the independents steadfastly refused pole attachment requests and thus were accused of anti-competitive and discriminatory practices.[22]

Regulatory intervention began as early as 1966 when the FCC questioned the nature and extent of its jurisdiction. In 1970, the FCC took limited steps to regulate access to telephone poles and conduits. In 1970, the FCC promulgated a general ban on cable/telephone company cross-ownership. However, the ban did not restrict a telephone company from owning a cable system outside of its service area. In addition, the FCC instituted a waiver process whereby a telephone company was allowed to provide cable service if it could demonstrate this provision of service would "advance the public interest." Any telephone company seeking a waiver of the restrictions on cross-ownership was required to demonstrate that independent cable companies had first been offered access to the company's poles and conduits at reasonable rates.[23]

21 Telephony and Cable Television, *op. cit.*
22 *Ibid.*
23 *Ibid.*

In 1973, the FCC terminated the evidentiary phase of its inquiry launched in 1966. In 1975, the National Cable Television Association and AT&T entered into an agreement on pole attachment rates. To aid other parties that were negotiating or renegotiating pole attachment agreements and that did not participate in this agreement, the FCC staff released a formula that could purportedly be used to establish reasonable rates. This action was the FCC's first attempt at rate formalization. In 1976, the FCC declared that it did not have jurisdiction over poles owned by power companies and deferred a decision regarding telephone poles. As late as March 1977, the FCC affirmed its 1976 decision.[24]

Prior to 1978, the FCC relied primarily on negotiation as the principal means of establishing rates for pole attachments and conduit access. As described above, the conflicts that arose were primarily between telephone and cable companies. It was this conflict that, in large part, gave rise to the 1978 Pole Attachment Act.

1. <u>Other Industries</u>

Prior to 1978, the dominant regulatory theme was heavy price regulation, if not outright control. Before this time, the nation had legislative wellhead price controls on crude oil and natural gas. The natural gas industry was heavily regulated, with the interstate pipelines serving as merchants and transporters. The price ultimately paid by consumers consisted of a regulated wellhead price and a regulated mainline transportation and distribution charge. At no point along the transaction path were competitive market forces allowed to determine prices. The electric industry was regulated in a similar fashion. This industry was highly vertically integrated, with the consumer paying a regulated generation, transmission and distribution fee. At the time, regulation was motivated, in large part, by the belief that all the various functions of both industries were safely characterized as natural monopolies. As such, the guiding principle was to maintain extensive vertical integration and provide secure monopoly franchises. In most cases, the rates for the various industry functions were cost-based and developed with

[24] See U.S. House of Representatives, Rept. 95-721, Part 2, Supplemental Report, *Federal Communication Commission Action*, p. 6.

reference to the historical investment costs and current accounting costs.

B. 1978-1996

With the 1978 Pole Attachment Act, the FCC was given authority to regulate rates and terms of access for pole attachments in the event the states failed to impose regulation themselves. The FCC devised a formula to establish "just and reasonable" pole attachment rates and also set up a detailed complaint procedure to encourage private resolution of most disputes. The 1978 Act, while establishing a rate, did not provide an absolute right of pole access; it remained a matter of contract negotiation.[25] As described in the previous section, the cable industry flourished over these years and ultimately was able to run wire to the doorsteps of over 90% of the nation's residences.

1. Other Industries

The regulatory climate during the 1978-1996 era for other industries, energy in particular, contrasts starkly to the environment prior to 1978. Throughout this period, the energy industry became unshackled from price controls and was guided by deregulatory/market-based solutions.

In the early 1980s, as a result of legislative-induced shortages and distortions in the gasoline markets across the country, wellhead price controls for crude oil were lifted, as were the entitlement programs and other restrictions placed on domestic refining operations. In 1978, the Natural Gas Policy Act set out to decontrol the myriad of complex wellhead price controls established for natural gas that ultimately caused the gas shortages and curtailments experienced in the 1970s.[26]

In addition to the decontrol of prices, Congress and the various state and federal agencies began to pursue a much more market-based approach to the provision of gas and electric

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25 Telephony and Cable Television, *op. cit.*

26 Regulations Implementing the Natural Gas Policy Act of 1978, 5 FERC ¶ 61,114 (1978).

services. In the 1980s, a number of key mandates in the gas industry ultimately forced interstate pipelines to eliminate their merchant function and act solely as common carriers that provided non-discriminatory access on just and reasonable terms.[27] As a result, large industrial customers and local distribution companies ("LDCs") were allowed to contract directly with natural gas producers. In the 1990s, a similar process has begun for the LDCs themselves. In many cases, LDCs are exiting the merchant function and limiting their role to distribution only. In their place, marketers and brokers have emerged and are providing direct service to the LDCs' former customers.[28]

The very same desire for direct customer access in the gas industry also developed in the electric industry. Throughout the 1980s, the issue of forced divestiture of generation, transmission and distribution has been debated, as has the issue of direct access to utility customers. In the 1990s, federal regulation was adopted to require non-discriminatory access on the nation's transmission networks.[29] Accordingly, many states have developed open-access plans that would allow their customers to purchase their electricity needs from any supplier, not just the local electric utility.[30]

Along with the de-integration of the gas and electric industries and the increase in access at all levels for all functions, the various state and federal regulatory bodies also began to depart from the traditional ratemaking methodologies, such as embedded cost-of-service models, that

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27 Order No. 436, 33 FERC ¶ 61,007 (1985); Order No. 636, 59 FERC ¶ 61,030 (1992).

28 LDCs in at least 18 states and the District of Columbia are offering their customers the opportunity to choose an alternative supplier. While not all of the LDCs have plans to completely exit the merchant function, they have opened their systems, allowing marketers and brokers direct access to customers. See also *Providing New Services to Residential Customers: A Summary of Pilot Programs and Unbundling Initiatives*, American Gas Association Issue Brief 1997-03, April 18, 1997.

29 Order No. 888, 75 FERC ¶ 61,080 (1996).

30 California State Legislature Assembly Bill 1890, Signed into law September 1996. Beginning January 1, 1998, consumers from all customer classes will be able to buy electricity from either their current utility or another electricity supplier. Likewise, several states have legislation in place requiring retail choice: New Hampshire and Rhode Island by 1998, Maine by 2000, and Montana by 2002. Several public service commissions have issued plans ordering open access: Massachusetts and Vermont by 1998, Arizona by 1999, and New Jersey by 2001. Finally, legislation for direct access has been proposed in Pennsylvania, Oregon, Oklahoma, and South Carolina.

were adhered to before 1978. Recognizing that price decontrols and open access had generated thriving spot markets and a plethora of alternative energy suppliers, regulators began developing more market-sensitive rate approaches for the services under their jurisdictions.

Throughout this period, regulators began investigating to what extent their ratemaking methodologies could better reflect competitive market outcomes. In some cases, the traditional embedded cost methodologies were modified in ways that produced rates more equivalent to the prices observed in the emerging markets. Regulators also sought to establish rates that provided better incentives and thus reduced the perverse and distortionary effect observed in the past. During this period, regulators also began to see the importance and feasibility of allowing market-based negotiated rates for services under their jurisdiction. Market-based prices were implemented for many functions of the energy industry that were heretofore considered natural monopolies. Market-based prices have been investigated and implemented for interstate gas transmission service and LDCs' sales functions. In the electric industry, market-based pricing has been adopted for generation in some states and is being considered for other segments as well.[31]

C. *Post-1996*

The evolution in pricing for poles and conduits in the post-1996 environment is currently being debated. The evolution in regulation and pricing for other industries continues along the same path as that prior to 1996. The objective for the electric and gas industries is more, not less competition. State and federal regulatory bodies continue to open up markets. Along with the increase in access, regulators are adopting and relying more heavily on market-based rate solutions. For those functions deemed competitive or potentially competitive, regulators are proposing market-based pricing. For those functions deemed not competitive or not likely competitive in the near future, regulators are continually experimenting with rate structures that provide proper incentives and generate rates more consistent with competitive market prices.

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[31] See Edison Electric Institute's *Regulatory Briefing Service-FERC Power Marketer Proceedings* for market-based ratemaking applications submitted to and approved by the Federal Energy Regulatory Commission.

Section III. Dominant Pricing Paradigms

The previous section presented a broad historical and evolutionary perspective on how the FCC and other agencies have approached the issue of pricing for regulated services under their jurisdiction. If one were to survey the methodological approaches relied on over the years, it would become apparent that regulatory agencies have employed variations on essentially five dominant pricing frameworks. These frameworks, which can be thought of in terms of a continuum, include pricing established via:

A. Cost-of-service ratemaking where investment in plant is based on historical embedded costs;

B. Cost-of-service ratemaking where investment in plant is based on replacement costs;

C. Incentive ratemaking formulas;

D. Negotiation with a recourse option; and

E. Negotiation with no recourse option.

This section discusses each of these five dominant pricing frameworks and is included in this report as a means to evaluate the appropriate pricing methodology for pole attachments and conduit access. This discussion is intended to allow useful parallels to be drawn between the conditions (institutional, regulatory and market) that motivated the choice of framework listed above and that which exists for pole attachments and conduit access. This section also serves to highlight the evolution in pricing frameworks for regulated services.

The above list represents a continuum in that the first pricing option, cost-of-service ratemaking based on historical embedded costs, is clearly associated with what is commonly referred to as "heavy-handed" regulation, whereas the last pricing option, negotiation with no recourse option, is associated with a pure market-based outcome. The choice of pricing methodology, regardless of which agency or jurisdiction is doing the choosing, has always been guided primarily by perceived market conditions as well as the current institutional and regulatory environment. Each framework is described in detail below.

A. Cost-of-Service Ratemaking: Historical Embedded Costs

As a regulatory "tool," this type of ratemaking clearly has the longest history; it originated in railroad regulation in the late 1800s under the Interstate Commerce Commission.[32] In its simplest form, rates are determined in reference to a revenue requirement, which in turn is determined by summing two aggregated components of a firm's costs: the expenses incurred to provide the service and a return on capital. The latter component is calculated by applying an allowed rate of return to the rate base. The rate base is primarily the net book value of plant investment, which is determined by subtracting accumulated depreciation from the original cost of the plant investment.

This type of ratemaking, and regulation in general, was motivated in part by three issues:[33]

- Natural monopolies;
- Undue price discrimination; and
- Destructive competition.

Early in the history of regulation, it was generally accepted that in some cases, it is preferable to have one firm, as opposed to many, serve a particular market. This situation arose in those instances in which the nature of technology provides significant cost savings to larger firms. Specifically, economies of scale are said to give rise to natural monopolies. If a firm enjoys economies of scale, it can double all of its production inputs and more than double its output. As a result, the firm can lower costs simply by expanding the size of its operation.

Without regard to economies of scale, early regulation was also motivated in part by undue price discrimination and destructive competition. Undue price discrimination exists if consumers are charged different prices for the same product and the differences cannot be accounted for by cost differentials. Destructive competition is said to result when an industry

32 H. Craig Peterson, *Business and Government*, Second Edition, Harper and Row, 1985, Chapter 10.
33 *Ibid.*

is marked by excessive price wars. Although in the short run consumers benefit from such a situation, it is thought that consumers can be harmed in the long run by excessive price wars through collusion, poor service, or the demise of the number of firms in a market.

Although cost-of-service ratemaking based on embedded costs developed in response to all three of these issues, its origin is most certainly related to the notion of natural monopoly. Economists have long held that the pricing and output decisions of a natural monopoly, if regulated, present somewhat of a dilemma. First, if granted a monopoly franchise but left unregulated, the firm would produce too little output and charge too high a price. In short, the equilibrium conditions for this firm would be no different than any firm capable of fostering and maintaining its monopoly position. Alternatively, if granted a monopoly franchise but forced to price its product in a manner consistent with a competitive market (*i.e.*, price equal to marginal costs), the firm would be unable to earn a normal return on capital. The latter situation results because the marginal costs for a natural monopoly decline over the relevant range of production and, as such, are always less than the firm's average costs, which include the return component.

To address the dilemma just described, regulators adopted a ratemaking principle based on average costs. Specifically, the natural monopoly was required to set a price equal to the average, as opposed to the marginal, cost of production. The rates resulting from a revenue requirement based on embedded costs are designed to be equivalent to a firm's average costs. Unfortunately, average-cost pricing based on embedded costs is deficient on two grounds. First, even if average costs are correctly captured, such a requirement imposes what economists term a "welfare" loss on society in that prices diverge from the optimal level equivalent of marginal costs. Second, and more importantly in the long run, an average cost calculation based on embedded costs is unlikely to equal the true economic equivalent of long-run average costs. This second fact has the potential to impose significant distortions in the market.[34]

[34] See Robert S. Pindyck and Daniel Rubenfeld, *Microeconomics*, 1989, pp. 292-295 for a discussion of welfare or deadweight loss and Chapter 7 for a discussion of long-run average cost.

In the early years of regulation it was recognized that the prices set through the regulatory rate process can not be arbitrary or ill-conceived. Rates must serve as signals in regulated markets, much like prices are signals in unregulated markets. Prices affect the actions of consumers and potential competitors, and act to allocate resources. If rates are set too high or too low, resources will not be allocated efficiently. Rates that are too far above normal competitive levels cause consumers to reduce consumption and provide alternative suppliers with a strong incentive to enter the market and compete with the regulated firm. Conversely, rates that are below their competitive equivalents encourage consumers to consume too much, and provide regulated firms with little incentive to reduce long-run investment and alternative suppliers with no incentive to enter the market and make up any shortfall.

It is thus important to initially establish a rate that approximates, to the extent possible, a price observed in a competitive market. The use of embedded costs and, particularly, net book value as the basis of the return component of a regulated company is problematic. The net book value of a regulated firm is calculated by reducing the original cost of plant investment by accumulated depreciation. This may or may not reflect the competitive market value for those assets. In the event that net book value does not equate to the competitive market value, the established rate will not equal its competitive counterpart. The further the rate, based on net book value, diverges from its competitive counterpart, the larger the distortion and subsequent misallocation of resources. Regulators have long understood the shortcomings of this type of ratemaking and have been gradually departing from this method and adopting alternative frameworks that are more capable of imitating competitive market pricing.

Cost-of-service ratemaking based on embedded costs arose in an era in which natural monopoly theory was firmly entrenched. This form of ratemaking also developed at a time when markets were characterized by large firms with little, if any, competitive threat from smaller "fringe" firms. These facts, combined with the desire to construct a tractable framework, motivated cost-of-service ratemaking based on embedded costs (most importantly, plant investment valued at net book value). The ease of implementation cannot be overlooked as a motivating factor for the development of this type of ratemaking. A regulator's job was made much easier if all that was required was an audit of the regulated firm's books to determine the various cost components included in the ratemaking formula. Unfortunately, the ease with which a rate can be established must be, and is, weighed against the distortionary cost imposed on the market. The use of net book value of investment as the basis for a cost-based rate has increasingly been recognized as imposing significant market distortions.[35] While regulators have recognized that the use of historical costs can impose pricing distortions, they have also recognized that departures from this type of ratemaking can give rise to stranded investment. Stranded investment can arise in those instances in which a regulated entity is required to charge a rate for its services that is inadequate to recover its prudently incurred historic costs. It is generally accepted by regulators and policy makers that, unless it can be shown that these historical costs were imprudently incurred, that the regulated entity should be provided the opportunity to recover these costs. Actual recovery of these costs can be accomplished in any number of ways. It is this recognition that has motivated regulators to employ alternative capital cost concepts. Ratemaking based on the replacement cost of capital is one such alternative.

B. *Cost-of-Service Ratemaking Based on the Replacement Cost of Capital*

In times of price stability, the value of plant investment neither rises nor falls. Thus, the reliance on net book value to compute cost-of-service rates does not impose the distortions previously discussed. However, over the past four decades, price instability has been the rule rather than the exception.

As prices rise, the replacement cost of capital will, of course, exceed the net book embedded value of capital. Conversely, as prices fall, the replacement cost of capital will be less than embedded book value. It is not surprising that the price of investment goods can

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[35] A market distortion is said to exist if prices set in the ratemaking process diverge significantly from the competitive standard. Prices set with reference to net book value can in no way be expected to emulate such prices. Assuming competitive market conditions, the only costs considered by producers are those under their control (*i.e.*, forward-looking costs) and do not include historical costs. Thus, competitive market prices cannot be expected to, and do not, increase or decrease to reflect costs already incurred (*i.e.*, net book costs).

increase over time and equal or exceed the economy's general inflation rate. While at first glance, falling prices might seem rare, in reality, it is not uncommon to observe the prices of capital falling, which can be attributed to improvements in technology. The productivity of a unit of capital good can increase as technology improves, thus leading to price decreases.

Significant price instability caused regulators to adopt replacement cost as the relevant value of capital to be included in their ratemaking formulas. Replacement cost ratemaking is desirable for a number of reasons. A cost-of-service rate based on replacement costs more closely approximates the prices that would be observed for the provision of the good in a competitive market. Replacement cost ratemaking imposed on the incumbent regulated firm also prevents that firm from exercising market power at the expense of other firms or consumers. Further, replacement costs create the right investment incentives for the incumbent firm as well as competitors. Finally, replacement costs prevent the incumbent firm from engaging in anti-competitive cross-subsidies which could hinder the development of a competitive market. Specifically, in those instances where a utility has an affiliate company, replacement costs prevent the utility from favoring its affiliate with low, embedded cost-based rates. The use of replacement cost, in effect, places the affiliate on the same par with other firms in the market. Thus, overall, the use of replacement costs requires that regulated incumbent firms price at levels consistent with competitive market conditions.

Although the use of replacement cost in ratemaking formulas represented a step closer to imitating competitive market pricing, regulators were still burdened by the extensive audits required to establish rates as well as the long and tedious rate case process used to validate each and every cost component. In addition, the regulator was charged with the often burdensome responsibility of determining the prudence of the firm's investment, purchase and operating decisions. The prudence process is a hindsight review in which a commission audits the firm's expenditures and operating decisions to determine if they meet the commission's prudence standard. It soon became clear that these exercises were time-consuming and costly for both the regulator and the firm being regulated. To move beyond such reviews, commissions and regulated firms began investigating alternative ratemaking frameworks that would alleviate the need for the prudence review, while simultaneously producing a rate consistent with competitive market conditions. The use of incentive ratemaking was one such step in this direction.

C. *Incentive Pricing*

Incentive pricing has two primary goals and one secondary goal. Incentive pricing was conceived primarily as a vehicle to more firmly align the interests of ratepayers and the regulated firm, and it was also considered a more practical means for achieving a rate structure consistent with an unregulated market. Secondarily, incentive pricing has been "sold" as a means of eliminating hindsight prudence reviews.

The adoption of replacement costs, rather than embedded net book value, as a means of measuring plant investment has long been considered a more appropriate way of capturing market value in a cost-based rate. However, this step alone does not guarantee that the resulting rates will be equivalent to their competitive market counterparts. A regulated firm has a great deal of discretion in its investment and purchasing decisions. While a regulator can oversee these decisions and review their prudence, as a practical matter, a regulator cannot oversee all decisions. Moreover, in some decisions the regulated firm has a clear incentive to "play it safe" and engage in behavior that, while consistent with a prudence standard, is not necessarily cost-minimizing. In some respects, the regulated firm faces a "catch-22." If the firm tries innovative strategies to reduce costs, it runs the risk of not being effective. In addition, the firm also takes the chance that the regulator, through a hindsight review, might deem such a strategy imprudent and "disallow" the firm recovery of those costs. In the event the strategy is successful and, in fact, lowers costs, the firm, in the absence of an incentive ratemaking plan, is not rewarded for superior performance. In these cases, the interests of the regulated firm and its customers are clearly at odds.

Incentive ratemaking was, in part, a response to the improper alignment of interests between the regulated firm and its customers. Under an incentive ratemaking plan, a regulated firm's performance is measured against a cost benchmark. If the costs incurred by the firm exceed the benchmark, the customers and firm share in the excess costs. Conversely, if the firm is successful in reducing costs below the benchmark, the customers and the firm share in the savings. Thus, the interests of the firm and those of the customer are firmly aligned.

The construction of the benchmark satisfies the other primary goal identified above. The cost benchmark under an incentive ratemaking plan must be objective, verifiable and market-sensitive. The latter goal renders rates under incentive pricing plans more consistent with competitive market standards. A regulated firm's costs are no longer determined in strict reference to the historical (or even replacement costs) embedded costs. Instead, the costs are determined in reference to market-determined benchmarks that can be based on industry-wide standards or published market indices. It is important to note that the benchmark is market-sensitive and thus comparable to the prices in competitive market conditions. The prices charged by the regulated firm are consistent with competitive market conditions and thus act as meaningful price signals, as mentioned previously. Consumers and firms in the market, as well as those poised to enter the market face the proper price signal and thus make more efficient long-run decisions.

Aside from its attractiveness at generating proper pricing signals and properly aligning the interests of firms and customers, incentive pricing has been considered desirable because it is a market-based alternative in those instances in which reduced regulation is not appropriate. That is, the decision to reduce or eliminate regulation must be based on whether the market has features consistent with competition. In some instances, a market simply does not meet these criteria. For example, the distribution (not transport or sale) of natural gas by the LDC is considered to be one of the true remaining natural monopolies. It would not be in the public interest to have competing firms building distribution pipelines and offering this service. Rather, it is more cost-effective to have one firm serve an entire community. Although this is an extreme example in which eliminating regulation is not likely to be appropriate, it does not mean that establishing rates consistent with competitive market conditions is impossible. This can be achieved through incentive pricing.

Although an attractive alternative, incentive pricing is not a replacement for rates or prices established by negotiation in a competitive market. Because of this fact, commissions have subscribed, where appropriate, to a ratemaking methodology whereby rates are determined through negotiations between the purchaser and the seller. In those cases where there is a lingering suspicion that the market might not have features consistent with competition, regulators have allowed negotiation to determine prices, but have reserved the right for purchasers to employ a recourse option.

D. *Negotiated Rates with a Recourse Option*

Negotiated rates began to emerge with the realization that some markets and services under regulatory control did or could develop features consistent with a competitive market. In particular, many cases exist in which a governing regulatory body prevented market entry. As regulators began to allow entry, competitive market condition did indeed develop in some markets. As competition began to take hold, the need for cost-based or incentive-type rates diminished and in most cases conflicted with the new competitive environment. To accommodate and advance competition and to place all market participants on an equal footing, regulators began exploring market-based pricing solutions.

Negotiated rates with a recourse option was one of the first market-based rate concepts with which regulators experimented. Based on a market power evaluation that demonstrated a lack of actual or potential market power, regulators relied on negotiated rate solutions. Negotiation of rates, of course, differs from the previous three rate concepts described in this section in that the rates are determined through a market-based bargaining process. However, the recourse option alters the bargaining process somewhat.

The recourse option was imposed by regulators in those cases where it had not been adequately demonstrated that a firm or market was effectively competitive. Negotiated rates with a recourse option provided purchasers of a regulated good or service two options. First, the parties were free to negotiate a rate. In a competitive market, such a rate would be deemed efficient and thus would properly serve to allocate resources in an efficient manner. Second, in the event the parties could not agree on a rate, the purchaser was allowed a recourse to the cost-of-service rate established by the regulator.

Although negotiated rates with a recourse option was a significant first step towards more desirable market-based outcomes, some problems have arisen. These problems stem from the recourse option. Depending on the difference between the negotiated and recourse rate, either party to the transaction might have little incentive to negotiate. For example, if the cost-based embedded rate is substantially below the market-determined negotiated rate, purchasers will have little incentive to negotiate. The negotiation process is rendered, for all practical purposes, moot.[36]

E. *Negotiated Rates with No Recourse Option*

Negotiated rates with no recourse option alleviate the problems associated with the recourse itself, and have been adopted by regulators in those cases where a firm or market has been deemed effectively competitive.

Absent a recourse option, parties to a transaction are forced to bargain in good faith. At no time can one party hold the other "hostage" as a result of the recourse option. In those instances where effective competitive negotiation prevails, this is the preferred option. Negotiated rates with no recourse option are market-based, thus the prices generated through such negotiation give rise to all the benefits observed in a competitive market. These benefits and the guiding principles that should be adhered to when choosing a pricing framework are discussed in the next section.

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36 In its rulemaking proceeding RM96-7, the FERC requested comments on how best to implement a recourse rate service for the nation's interstate natural gas pipelines. One of the issues on which the FERC sought comment was how to maintain the "integrity of the recourse service." In reply, some pipelines commented that shippers not be allowed to "cherry-pick" between negotiated terms and recourse rates and thus reserve valuable rights while avoiding, in part, the related costs. This is simply a recognition that the pipelines offer multiple services and should be allowed to negotiate a "package" of services tailored to the customer's need. If forced to provide a recourse rate for every specific service, the shippers would simply choose the lower of the recourse or negotiated rate on a service-by-service basis. In this case, the pipeline is incapable of packaging services in a way that increases the value to them and the shippers. See Foster Natural Gas Report, No. 2083, pp. 1-19.

Section IV. Guiding Economic Principles-Choice of Pricing Framework

A few guiding principles for choosing an appropriate pricing framework can be distilled from the discussion in the preceding section. These principles have guided agencies in the past and thus should clearly guide the decision on pole attachments and conduits.

A. Why Regulation?

Regulation, as previously mentioned, must be premised on an observed market failure. Markets can fail under a number of circumstances, including the presence of:

- Economies of scale or scope;
- Market power;
- Negative or positive externalities;
- Public goods; or
- Information asymmetries.

As mentioned at the beginning of Section III, the presence of economies of scale and scope was the primary motivator underlying early regulation. In order to capture the cost savings of a firm or industry enjoying economies of scale (*i.e.*, natural monopolies), it was necessary to allow monopoly franchises. However, the absence of regulation in these monopolies would act to extract monopoly profits by decreasing production and increasing prices. Rate regulation was the only viable solution.

Regulation is also called for in those instances in which a firm or set of firms has the potential to exercise market power, which, loosely defined, is the ability to restrict output and increase prices above competitive levels on a sustained basis. The source of market power can stem from various things including, but not limited to: product differentiation, the ability to restrict or hinder entry, the lack of viable alternatives, superior bargaining power and the ability to collude. The extent of regulation, of course, must be measured against the severity of market power. For example, heavy-handed regulation is probably not appropriate in those markets where a firm, or set of firms, while capable of exercising market power, can effectively achieve profits that are only slightly above normal. In this instance, the costs of regulation imposed on the market would likely outweigh any benefit achieved. It is preferable to explore options to make the market more competitive without resorting to full regulation.

The existence of externalities, public goods and information asymmetries might also call for market intervention. Externalities can be either costs imposed or benefits generated that are not incorporated into market participants' decisions. The oft-cited example is pollution. As part of the manufacturing process, a firm can emit a sizable amount of pollution, the cost of which is borne by society rather than by the firm. This external cost is not internalized by the firm in its decision on how much to produce and, as a result, the firm produces too much. Public goods are those goods and services that are not likely to be provided by the private sector, primarily because it is extremely difficult to price these services and, most importantly, collect their costs from the final consumer. Public goods include services such as lighthouses and highway safety. Finally, in some cases, a firm can enjoy a substantial advantage over consumers as a result of an information advantage. For example, the products of drug companies are regulated because it is difficult for the consumer to make informed choices, absent extensive research, about these types of products. The presence of any of the above market failures must be closely evaluated prior to choosing the appropriate pricing framework. The goal, however, of the pricing framework chosen is clear.

B. The Goal of the Chosen Pricing Framework Is to Emulate Competitive Market Pricing

Choosing among the pricing frameworks outlined in the previous section is rather straightforward. The regulator must choose the framework that best responds to the type of market failure observed. More important, such pricing framework should emulate a competitive market price structure.

It has long been held that the pricing and production outcomes observed in a fully competitive market are far superior to those resulting from regulation. This is so because to have *any* chance of replicating the results of a competitive market, the regulator must have access to a mass of information that is both costly and difficult, if not impossible, to obtain. As a result, the pricing dictated by regulation is generally far removed from its competitive counterpart, thus resulting in highly distorted and inefficient consumption, production and investment decisions.

Competitive market solutions are desirable primarily for the following reasons:

- Competitive markets ensure an efficient allocation of resources.
- Competitive markets reduce/eliminate subsidies/tax burdens and the resulting deadweight loss.
- Competitive markets minimize transactions costs.
- Competitive markets are self-sustaining.

The first point listed comes directly from any principle-level economic textbook. Competitive markets achieve what economists call allocative and productive efficiency. Allocative efficiency is another way of saying that goods and services are allocated to those who value them the highest. Productive efficiency refers to the fact that firms produce those goods and services and minimize long-run cost. Allocative and productive efficiency implies that resources cannot be reallocated in such a way as to benefit both consumers and producers.

The other three reasons listed above are somewhat subsumed in the first, but deserve special attention. Competitive markets are desirable in that they reduce or eliminate subsidies and tax burdens, and thus eliminate what economists call deadweight losses. Deadweight losses are simply lost consumer and producer benefits. Competitive market solutions are also void of direct or indirect subsidies or taxes. In a regulated environment, firms have the potential to subsidize and cross-subsidize certain services. In competitive markets, these subsidies and the associated deadweight losses could not be sustained.

As mentioned previously, the goal of cost-of-service pricing is to achieve a rate consistent with the average cost of a regulated firm. This is not a competitive market outcome. An efficient equilibrium condition is one in which price is set equal to long-run marginal cost. By setting a rate equal to average cost, a deadweight loss is generated.

Competitive markets also minimize transaction costs. Economists have a rather exhaustive definition of transaction costs. Transactions costs include not only the pecuniary costs incurred to negotiate, but also include the non-pecuniary costs firms and individuals incur in the course of negotiation and contracting. The first type of cost is of importance here. As opposed to regulated markets, competitive markets do not impose the pecuniary costs imposed on regulators and regulated firms. An immense sum of money is spent establishing and maintaining a regulated rate structure.

Probably the most desirable feature of competitive markets is the ability to ensure a self-sustaining market structure. That is, by definition, a competitive market has no barriers to entry or exit and consumers are free to migrate to the most efficient (*i.e.*, lowest-cost) producer. The make up of firms and consumers might change over time, but the actions of all market participants and the resulting pricing and production outcomes will be consistently equivalent to a competitive market standard.

With the desirable features of a competitive market as a backdrop, the regulator must then evaluate to what extent a market or industry has features consistent with a competitive market in deciding whether to intervene. That is, intervention must be premised on the basis of market failure.

C. *Choice of Pricing Framework*

The preceding discussion makes it clear that a competitive market solution is, and has always been, preferred to a regulatory solution. Thus, in deciding on the appropriate pricing framework for a regulated firm, the regulator must first make a threshold determination. That is, the regulator must decide whether the market or industry exhibits features consistent with a competitive market. The regulator must determine the presence or likelihood of the market failures listed at the beginning of this discussion. However, by far, the most critical question that must be raised is whether, absent regulation, a firm or set of firms could exercise market power on a sustained basis.

If upon evaluation, a market or industry is shown to have no inherent features inconsistent with a competitive marketplace, the choice of pricing framework is clear. In the absence of evidence to suggest a market is not competitive, the pricing regime must be dictated through negotiation. Buyers and sellers must be free to negotiate a price at which a good or service is transacted. This choice, for all the reasons listed previously, will result in the highest level of economic benefits for all parties.

In the event a market or industry exhibits some features contrary to a competitive marketplace, the regulator must then choose the pricing framework that best approximates the competitive standard, while at the same time minimizing costs to the regulator and the firm being regulated. The latter is a recognition that any pricing framework chosen, other than free negotiation, will entail costs. The deadweight losses and associated distortions are such costs and will be borne by the market as a whole. Additionally, the regulator and the regulated firm will also bear costs over and above those incurred by society in that the framework established will require extensive reporting and auditing requirements. Finally, for reasons cited earlier, once a rate regime is established, it can be expected that the interests of the firm and customer will likely begin to diverge. In choosing the appropriate pricing framework, it is important to recognize the costs imposed as well as the perverse incentives that can arise. The 1996 Act was a response to the prior problems inherent in regulated industries, and a reaffirmation that competitive market results are preferred.

Section V. The 1996 Act Revisited: Intent and Supporting Economic Theory

It is not possible to render judgment on the appropriate framework for poles and conduits without referring to the 1996 Act. The 1996 Act was a comprehensive and ambitious piece of legislation with a clear and resounding theme. The 1996 Act was meant to establish a "pro-competitive, de-regulatory national policy framework."[37] This theme and Congressional intent are abundantly clear in the legislation. The Senate stated that "[c]ompetition, not regulation, is the best way to spur innovation and the development of new services. A competitive

[37] S. Conf. Rep. 230, 104th Cong. 2d Sess. 113 (1996).

marketplace is the most efficient way to lower prices and increase value for consumers."[38] Similar legislation came from the House of Representatives. Its bill was designed to "promote competition and reduce regulation."[39]

The FCC has made it clear that it is important to choose and establish a pricing framework consistent with the competitive theme of the 1996 Act. For example, in the First Report and Order Regarding Local Competition, the FCC set forth its pricing provisions for interconnection and unbundled elements. In rejecting a cost-based pricing framework based on embedded costs, the FCC offered the following rationale: "[a]n 'embedded cost' based pricing methodology would be pro-competitor — in this case the incumbent LEC — rather than **pro-competition.**"[40]

The FCC's position in this order is particularly instructive and has direct relevance to the choice of a pricing framework for poles and conduits. First, it demonstrates the FCC's commitment to employ a framework that is logically consistent with established economic theory.

A. *The FCC's Choice of Pricing Framework for Interconnection and Unbundled Elements Was Firmly Grounded in Economic Theory*

The FCC's rejection of a pricing framework based on embedded costs in favor of a cost-based framework based on forward-looking costs is entirely consistent with economic theory and the decision framework presented in Sections III and IV. Namely, the FCC sought to develop a framework that addressed potential market power concerns while at the same time generating a rate structure consistent with competitive market principles.

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38 Telecommunications Competition and Deregulation Act. 141, Cong. Rec. S 8570, Vol. 141, No. 99, June 5, 1995.

39 Telecommunications Act of 1996, H. Rep. No. 104-458, Jan. 31, 1996.

40 First Report and Order Re Local Competition of the Federal Communication Commission Common Carrier Docket 96-98, paragraphs 704-705, emphasis added.

In establishing its pricing framework for ILECs, the FCC treated ILECs as "essential facilities." This designation recognized the control the ILECs exerted over the facilities and the need to allow access to potential competitors as a precursor to the development of a competitive market. In the rare instances in which this designation arises, it is clear that negotiated or market-based rates are not appropriate. There is simply too great a tendency for the incumbent firm to restrict access to its facilities, either directly through physical denial or indirectly by means of charging a price for access that is uneconomic for the entrant. Faced with the potential abuse of market power, the FCC correctly chose a cost-based ratemaking methodology. However, understanding the need to develop a rate structure consistent with competitive market principles, the FCC chose a cost-based methodology that approximates competitive market prices.

The FCC adopted a Total Element Long-Run Incremental Cost ("TELRIC") approach that captures forward-looking long-run economic costs. Of particular importance is the fact that under TELRIC, the ILEC must value its plant investment at replacement costs based on the most efficient technology. The FCC's rationale for adopting TELRIC was clear. The FCC has stated that TELRIC is appropriate because it:

- Simulates a competitive market;
- Prevents the incumbent LEC from exploiting market power; and
- Creates correct incentives.[41]

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[41] *Ibid.*, paragraph 635.

The FCC was correct in its determination that an embedded cost framework based on historical plant investment would not achieve the above objectives. The rate structure developed using historical embedded costs would in no way mimic competitive market prices in that the plant investment for the ILECs far exceeded its replacement value. Thus, the rate charged by the ILEC would far exceed that of a new entrant. Given such a large discrepancy, incentives for the ILECs and competitive entrants would be severely distorted. The FCC's choice of a cost-based rate will indeed prevent ILECs from exploiting their market power.

Section VI. The Appropriate Pricing Framework for Poles and Conduits

A. *The Choice of Pricing Framework for Pole and Conduits Must Be Guided by the Theme of the 1996 Act and the Same Set of Economic Principles Relied on for Interconnection*

The FCC has made clear its intent to deregulate and rely on market-based pricing methods to the maximum extent possible. This same determination and spirit should extend to the pole and conduit arena. The issue that must be addressed, of course, is whether and to what extent price deregulation is appropriate for pole attachments and conduit access.

In deciding on the appropriate pricing framework for pole attachments and conduit access, the FCC is faced with the same threshold issues identified in Section IV and confronted in its decision on ILECs. Accordingly, the FCC must determine whether a market failure exists in the market for pole attachments and conduit access. Of the types of market failures listed in Section IV, the FCC need only concern itself with the potential for electric utilities to engage in anti-competitive behavior. Issues such as economies of scale or scope, externalities, public goods and information asymmetries, have little relevance to the Commission's deliberations.

As will be discussed, there are already alternatives to the utilities' poles and conduits for entities seeking access. Thus, economies of scale and the desire to establish a protected monopoly cannot be a guiding motivation for regulation. There is also nothing to suggest that the electric utilities and the entities desiring access are nothing but fully informed, which renders moot any justification to regulate on the basis of asymmetric information. The only relevant form of market failure the Commission needs to consider is the issue of market power. The Commission must first determine whether the market for pole attachments and conduit access can be characterized as workably competitive and impose a pricing framework consistent with that determination. Second, in the event the FCC determines that the market for pole attachments and conduit access does not display the requisite competitive features, it must choose that cost-based methodology which best replicates competitive market conditions.

In determining whether negotiated rates for pole attachments and conduit access are appropriate, it is critical that the market for these services be evaluated with the proper set of analytical tools. The next section describes the relevant analytical perspective for this evaluation.

Note: In what follows, we discuss the appropriate analytical approach that should be used to determine whether negotiated rates should be allowed for pole and conduit access. We realize the FCC's discretion as to the pricing framework it adopts is constrained under Section 224(d). Specifically, there is nothing in the statute that gives the Commission authority to allow negotiated (i.e., market-based) rates. In spite of our recognition of the Commission's *limitations, we have included this discussion for two reasons. First, an evaluation of whether negotiated rates are appropriate is called for simply because it provides the Commission with needed information on the competitiveness of the market for pole attachments and conduit access. This, in turn, provides the FCC with useful information in its deliberations on the most appropriate cost-based rate methodology. Second, while constrained under Section 224(d), the Commission will not be constrained under Section 224(e), which dictates pricing for such access in the post-2000 market. Specifically, Section 224(e) anticipates a negotiated result. Thus, an evaluation of the market for pole attachments and conduit access is called for and consistent with prospective statutory intent.*

1. The Typical Approach to Market Evaluation

The typical analysis conducted to determine whether a market is competitive or whether a specific firm has the potential to behave anti-competitively proceeds by assessing the structural and behavioral features of the market and incumbent firms. A structural analysis begins by defining the relevant economic and geographic market for the good or service in question. As part of the analysis, the good or service is defined and any relevant alternatives are identified. Following identification of the good or service, the firms capable of providing the good or service are catalogued and their relative sizes noted. From this information, the analyst calculates measures of market concentration and firm market share. The calculations of concentration and market share are then used, in part, to infer the potential for market power. The potential for market power is generally said to increase with market concentration and firm size.

The structural analysis has a long tradition but has been criticized severely by economists.[42] The primary criticism is that the structural analysis leaves no room for conduct or behavior. Under the pure structural approach, market performance follows directly from conduct, which itself follows directly and entirely from market structure. It is now widely understood that this is terribly inadequate as an evaluative tool. There are simply too many observed counter examples in which a highly concentrated industry behaves extremely competitively while slightly or moderately concentrated industries exhibit conduct similar to the standard model of monopoly. To explain the plethora of counter examples, economist long ago began to emphasize the behavioral attributes of a market or firm.

The behavioral analysis goes beyond simple measures of market structure and instead investigates the behavioral features of the market that can facilitate or hinder an exercise of market power. Included in the set of behavioral features investigated are:

- The ease of actual and threatened entry;
- The ease or difficulty of collusion;
- The nature of bargaining power; and
- The dynamic interaction of firms over time.

2. <u>The Relevant Analytical Approach for Pole Attachments and Conduit Access</u>

Based on a pure structural standard, any measure of concentration for the pole attachment or conduit access market is extremely high. Simply put, the electric utilities and telecommunications companies own the vast majority of poles and conduits. Based on this recognition, one might conclude that negotiated or market-based rates are not appropriate. This,

[42] See for example, R. Schmalansee, Inter-Industry Studies of Structure and Performance, *The Handbook of Industrial Organization*, 1986.

however, is an erroneous conclusion on two grounds. First, even if one adopts the pure structural standard, a correct market definition would include all the potential alternatives to pole attachment and conduit access. Second, and vastly more important, a purely structural analysis is silent on the nature of competition and the bargaining relationship between electric utilities and cable and telecommunications companies.

While electric utilities do own poles and conduit, this is not the sole means by which cable and telecommunications services can be provided. For example, a CLEC wanting to enter a telecommunications market can lease telecommunication capacity from ILECs. A CLEC can also employ wireless technology. Finally, directly burying cable underground is another alternative to utility pole and conduit capacity.

The list of alternatives goes on. Cable and telecommunications companies themselves have their own conduit systems and rights-of-way which can be used, in some cases, as a direct substitute to utilities' poles and conduits. The existing resources of the cable and telecommunications companies are significant and are being aggressively expanded to meet anticipated market demand. The expansions of capacity are not only taking place as a means to link large geographic areas, they are being pursued to target very specific residential areas.[43] In addition to these alternatives, cable and telecommunications companies can also obtain conduit space from water utilities, long-distance carriers, other competitive access providers, highway authorities, transit authorities, sewage system operators and even freight tunnels in some cities. Cable and telecommunications companies can also pursue agreements with railroad, and gas and petroleum pipelines as alternatives to the electric utilities' poles and conduits.

It is important to revise the structural analysis to account for the availability of the alternatives just described. However, as a guiding analytical principle, it is far more important to recognize, and reflect in one's analysis, the nature of competition and bargaining relationship

[43] For example, Pacific Bell, MCI, AT&T and others plan to rewire the entire City of San Diego, including burying new coaxial underground connections into individual homes.

between electric utilities and cable and telecommunications companies.

First, there is little to no direct competition between the parties. Moreover, in those instances where electric utilities compete with cable and telecommunications companies, the degree of competition is minimal in that the electric utility holds a negligible market share and generally exercises control only through an affiliate company. Second, as discussed below, the question of who enjoys a superior bargaining position would be incorrectly answered if it is assumed that the electric utilities enjoy a preferred position.

a. *The Competitive Dynamics*

Any analytical exercise that sets out to determine whether electric utilities can exercise market power over the rates charged for pole and conduit access must begin by identifying the competitive posture of the utilities vis-à-vis the cable and telecommunications companies. A similar threshold issue was raised by the FCC in the Local Competition Order.

In that Order, the FCC correctly imposed an "essential facilities" designation on the ILECs, but not on the CLECs. The former were said to exert significant control over the means of competition, while the latter were not. This was of critical importance because the ILECs competed head-to-head with the CLECs. The FCC was clear on the need to force the incumbent LEC to provide access. The FCC stated, "Unlike other commercial bilateral negotiations, a competitive local exchange carrier or other new entrant comes to the table with little or nothing the ILEC needs or wants." The ILECs have a clear motivation to restrict access because in so doing they enhance their own competitive position.

An essential facilities designation cannot be imposed on electric utilities. This designation is required in those instances in which a monopolist refuses to provide a competitor access to facilities which are essential to competition in the relevant market. The core business of electric utilities is the provision of electric services, it is not the provision of cable or telecommunications services. The core business *is* the relevant market, and thus the only basis for an essential facilities designation. It cannot be applied to pole attachments or conduit access.

In short, the only conceivable analogy for electric utilities to the position taken by the FCC in the case of ILECs would be if the electric utilities were required to provide access on their poles for the wires of competing electric utility companies. This is not the case.

Unlike negotiations between the ILEC and CLEC, those between electric utilities and cable and telecommunications companies can be described as simple bilateral negotiations. In contrast to the case of the ILEC and CLEC, the cable or telecommunications company does come to the table with something the electric utility wants and needs. Specifically, the cable and telecommunications companies provide an additional revenue source for the electric utilities.

As previously stated, there is minimal competition between electric utilities and cable and telecommunications companies.[44] Without head-to-head extensive competition between the parties, there is no motivation to restrict access. Far from wanting to restrict access, utilities are highly motivated to bargain with cable and telecommunications companies simply due to the nature of what is being negotiated. Electric utilities are essentially marketing available capacity on their poles and in their conduits for non-electric services. They are not marketing something to a direct competitor, thus there is no threat of competition as is the case between ILECs and CLECs. The utilities' marketing of available capacity is analogous to the commercial building owner who leases advertising space on the side of his building.

The electric utility is, in fact, highly motivated to market space on its poles and conduits. In the absence of pole attachments and conduit access, the total cost of these assets is borne solely by the utilities' customers. To the extent the utilities can market these assets, their customers are made better off, as is the utility's competitive position in the electric distribution

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[44] As a result of the 1996 Act, public utility holding companies are now allowed to enter the telecommunications and video market. As of January 1997, only 18 such entities have applied under Section 103 of the 1996 Act. (See Federal Communication Commission, CS Docket No. 96-133, Third Annual Report, p. 7.) In general, utilities have entered these markets through affiliate companies. State commissions, in many cases, have existing "standard of conduct" rules for utilities which prevent them from providing preferential treatment to affiliates. For example, as a general rule, the terms and conditions of any service offered to affiliates must be extended to non-affiliates.

market.

Unlike ILECs, electric utilities are not marketing something that will ultimately be used to hurt their competitive position; they are marketing available capacity. The revenues from their efforts can be used to reduce the distribution costs to customers. As a proportion of total operation and maintenance expenses and total distribution investment, overhead poles and underground conduit are generally large cost components. Therefore, as a proportion of distribution-related costs, poles and conduits are significant items. From this it follows that any revenues the utility receives from marketing capacity on its poles or in conduits will have a non-negligible and favorable impact on distribution costs.

The need to reduce distribution costs for electric utilities is heightened in today's environment. Many electric utilities now operate under performance-based ratemaking ("PBR") programs.[45] Under these programs, a distribution-related cost benchmark is established that the utility must beat. If the utility is successful and costs fall below the benchmark, the electric utility is allowed to retain some of the savings. Conversely, if costs rise above the benchmark, the utility is forced to absorb a share of the excess costs. The revenues received from the utilities' pole and conduit marketing efforts could be used to offset costs. Thus, the electric utility has an added incentive to reduce costs and be as aggressive as possible in their marketing of pole and conduit capacity.

Without regard to PBRs, the electric utilities are clearly motivated to reduce costs as a result of the ongoing federal and state-level restructuring efforts.[46] Electric utilities today face,

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[45] At least 14 electric and gas utilities have proposed and/or implemented PBR programs: Boston Gas Company, Boston Edison Company, Eastern Edison Company, Massachusetts Electric Company, Public Service Electric and Gas Company, Southern California Gas Company, Western Massachusetts Electric Company, Southern California Edison, San Diego Gas and Electric Company, Oklahoma Gas and Electric Company, Rochester Telephone, Mid-American Energy, United Illuminating, Central Maine Power, and Pacific Gas and Electric Company. Source: published reports.

[46] All but one of the fifty states, either through their regulatory commissions, legislatures, or both, are considering or implementing policies to provide greater competitive options for retail electric consumers. Nine of the ten states that are far down the path to opening their local markets to competition have chosen to do so only in the last nine months, and customers residing in these states

or will eventually face, competition in what was once an established monopoly service territory. The restructuring efforts underway in the electric industry are quite similar in concept to those for telecommunications services. The states and federal government are advocating more access by customers to third-party suppliers. As the traditional markets being served by electric utilities are opened, the utilities face competitive threats from other suppliers, including large energy marketers. The long-term survival of electric utilities depends critically on their ability to reduce all costs, including distribution. The aggressive marketing of available pole and conduit capacity is one way to reduce those costs.

The discussion thus far has established why utilities are motivated to bargain with cable and telecommunications companies. The next section explains why the results of such negotiation can be expected to produce a competitive result.

b. *The Bargaining Relationship Between the Parties*

The bargaining relationship between market participants plays a key role in any market power or antitrust evaluation. Absent an evaluation and recognition of the bargaining relationship between electric utilities and cable and telecommunications companies, it would be impossible to render an informed opinion on a suitable pricing framework.

In the previous section, the economic motivation underlying the willingness of the utilities to market available capacity on their poles and conduits was discussed. In essence, this willingness brings the utilities to the bargaining table. Once at the table, the determination as to who enjoys a preferential bargaining position is dictated by a number of factors, including size, market presence and availability of bargaining options of the parties.

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represent over one-third of the nation's population. Stated another way, more than one-third of the nation's population lives in states that have chosen within the last year to move to open-access, customer choice markets. Several states have legislation in place requiring retail choice: California, New Hampshire and Rhode Island by 1998, Maine by 2000, and Montana by 2002. Several public service commissions have issued plans ordering open access: Massachusetts and Vermont by 1998, Arizona by 1999, and New Jersey by 2001. Finally, legislation for direct access has been proposed in Pennsylvania, Oregon, Oklahoma, and South Carolina.

In Section I of this report, the evolution of the cable industry was discussed. It is clear from that discussion that the cable industry is no longer in its infancy, but rather is a fully developed and formidable industry, as is the telecommunications industry. As can be seen from the data provided in tables contained in Section I, the cable and telecommunications companies are large and well-established. Electric utilities are certainly not bargaining with local "mom and pop" cable or telecommunications companies with little resources and no market knowledge. This bargaining relationship is one in which electric utilities face highly sophisticated cable and telecommunications companies with vast economic resources at their disposal. The size and level of sophistication of cable and telecommunications companies are not surprising when one looks at these companies' market presence.

In 1995, the top 20 cable companies combined constituted almost 74% of the entire market for cable services. In contrast, the top 20 electric utilities combined constitute less than 47% of the market for electric customers.[47] The largest cable company, TCI, serves well over 12 million customers across a multi-state region. In contrast, the largest investor-owned utility in the country, Pacific Gas and Electric, serves approximately 4 million customers in northern California.[48] These data reveal the cable companies' overwhelming market presence.

Recognition of the market presence of cable and telecommunications companies is important because it augments the set of alternatives, and thus the bargaining options available to these companies. In a bilateral bargaining relationship, the availability of options or alternatives strengthens bargaining power.

As was previously mentioned, the cable and telecommunications companies have alternatives to utility poles and conduits. As noted earlier in this report, these alternatives must be recognized before a meaningful measure of market concentration can be constructed. The

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47 Data for cable companies: Federal Communication Commission, CS Docket No. 96-133, Third Annual Report, p. 122. Data for electric utilities: Utility Data Institute, *Pocket Guide To Electric Utilities*, Fourth Edition.

48 *Ibid*.

presence of these alternatives also strengthens the bargaining position of cable and telecommunications companies, as does their sheer market presence.

In a bilateral bargaining relationship, the ability to "walk away from the table" serves as a credible "threat." The cable and telecommunications companies can present a very effective "threat" to the electric utilities as a result of the availability of alternatives and their market presence. The electric utilities, on the other hand, have no credible bargaining threats.

Cable and telecommunications companies can achieve their business goals in one of three ways. First, they can successfully negotiate with an electric utility for access to its poles or conduits. Second, they can pursue the myriad of alternatives to a utility's poles or conduits identified earlier. Finally, given their market presence, they can pursue a strategy that, in some cases, circumvents the local electric utility entirely. That is, the cable or telecommunications company may desire access to a utility's pole or conduits simply as a means to traverse the utility's service territory en route to a target market elsewhere. In many instances, the cable and telecommunications companies serve a geographical area that includes, but is not limited to, the electric utility's service territory. Given the geographical reach of the cable and telecommunications companies, they can reroute and find alternative utility providers.

The electric utilities do not have the same alternatives as those available to the cable and telecommunications companies. If the electric utilities are unsuccessful at striking a bargain with the cable and telecommunications companies, the available capacity on poles and in conduits goes unused. In the absence of successful negotiation, the electric utilities forego revenue. One might be tempted to suggest that the electric utilities can simply search out a new cable or telecommunications company and attempt to market the available capacity. While this is, in fact, true, two issues about this solution can be observed. First, given the concentration in the cable and telecommunications industries, within the electric utility's service territory, the utility's success in finding an alternative cable or telecommunications company is not guaranteed. Second, if an alternative company is found and the utility is successful in marketing the available capacity at the price the initial company rejected, then economic efficiency is enhanced in that the cable or telecommunications company who valued the capacity the highest obtained it.

The point to the preceding discussion is that when the negotiations fail, there is little to no economic consequence to the cable or telecommunications company given the available alternatives. However, there is an adverse financial consequence to the electric utilities in that they lose the entire revenue stream that would have resulted from the available capacity. *This issue cannot be overemphasized.*

The bargaining position of the cable and telecommunications companies is actually far superior to that of the electric utilities. The former can, in effect, "pit" the electric utilities against the alternative providers of capacity. The cable and telecommunications companies recognize that the electric utilities must negotiate with them as there are no other practical uses for the available pole and conduit capacity. The cable and telecommunications companies, however, are not similarly constrained in their options simply because of the availability of alternatives to the utilities' available capacity.

By way of analogy, the situation between the cable and telecommunications companies and the electric utilities is somewhat similar to a city that leases space on the outside of its bus fleet for advertising. The space on the bus exterior has no commercial value other than advertising. Thus, if the city is unsuccessful at leasing the space for advertising, the space goes unused and the city receives nothing. From the perspective of the advertiser, there are clearly many alternatives to leased space on a bus for its advertisement. The advertiser can use television, radio, billboards, magazines, newspapers, the Internet, etc. Clearly, the city can in no way attempt to extract anything above the competitive value for the advertising space and will likely negotiate far less. Although this example is somewhat analogous, the bargaining position held by the electric utilities is actually far less favorable than that of the city. The city is faced with a multitude of advertisers all vying for space. Electric utilities are faced with a relatively concentrated group of cable and telecommunications companies. The city can, if negotiations fail, seek out another advertiser with relative ease. In contrast, the electric utility has no such guarantee given the concentration of the cable and telecommunications industries.

The preceding discussion merely highlights the unequal nature of the bargaining relationship between electric utilities and cable and telecommunications companies. While it is difficult to quantify the relative strength of each party's bargaining power, this does not diminish the fact that such inequality exists.

In this section, the relevant analytical criteria to be used to evaluate the market for pole attachments and conduit access were discussed. At the outset, the discussion highlighted the inappropriateness of applying an essential facilities designation to the poles and conduits owned by electric utilities. In addition, as part of the discussion, a distinction between the structuralist and behavioralist approaches was drawn. As discussed, the former standard is entirely inappropriate for the task at hand. A more suitable approach would employ a behavioral standard and would recognize the competitive dynamics and bargaining positions of all the parties involved. It is clear from the discussion that the electric utilities are motivated to provide and bargain for access to their available capacity. It is also clear that the utilities possess no bargaining advantage over cable and telecommunications companies as a result of the market presence and bargaining options available to them.

The discussion in this section leads to a clear analytical conclusion. *A negotiated pricing framework should be employed in the market for pole attachments and conduit access.* There should be no concern over utilities' ability to engage in anti-competitive behavior. The negotiation process should be preferred in that this process will yield appropriate market-based prices that will enhance economic efficiency. If the FCC does not agree with this finding, the goal of economic efficiency should continue to guide the FCC's choice of pricing framework. Given this goal, the only alternative for the FCC to pursue is a cost-based pricing framework based on the economic or replacement value of capital.

Section VII. An Alternative Second-Best Pricing Framework

In the absence of negotiated rates, the FCC should employ a cost-based pricing framework based on the economic value of capital. The economic value of capital investment is equivalent to the forward-looking cost concepts already embraced by the FCC in the

Interconnection Order. As previously mentioned, the FCC explicitly rejected a pricing framework based on embedded costs in favor of a cost-based framework based on forward-looking costs. In particular, the FCC determined that ILECs' plant investment should be valued at a forward-looking replacement cost. Moreover, the replacement value should be based on the most efficient technology. The FCC chose a forward-looking economic cost approach because it generated prices most consistent with a competitive market. As such, the FCC concluded that resources in the industry would be most efficiently allocated.

The FCC closely followed the recommendations of economists when it chose a forward-looking economic cost approach in lieu of an approach based on embedded historical costs. In choosing the appropriate pricing framework for poles and conduits, the FCC should adhere to the same set of economic principles.[49] The choice of a forward-looking framework is consistent with relevant economic principles and the guiding statute.

A. Section 224(d) Requires That Rates Be Established with Reference to Actual Capital Costs

Under this statute, the FCC is required to establish a just and reasonable rate. The statute, of course, does not provide a specific formulaic calculation, but does indicate that the rate shall be determined with reference to the amount of space occupied by the attachment, the operating expenses and actual capital costs of the utility.

The utility's actual capital costs are forward-looking economic costs. The modifier "actual" must be interpreted to include the economic cost of capital that is based on forward-looking costs. Economists have long made distinctions between accounting and actual or economic profits. Accounting profits are, of course, calculated as the difference between revenues and booked accounting costs. Economic profit, on the other hand, is the difference between the revenue a firm receives and the costs that it incurs. The costs that a company

[49] Currently, the Commission's "TELRIC" pricing decision is on appeal in the U.S Court of Appeals for the Eighth Circuit. Regardless of the outcome of this appeal, the Commission should continue to be guided by the same economic principles that underlie our recommendation in this section. The appeal, if successful, will not in any way alter the fundamental economic support for our recommendation.

incurs, however, are not limited to those on the "books." They are all costs, including opportunity costs. All such costs are based on the actions of a firm, which include *actual* production activities. In deciding which activities to pursue, the firm must account for the opportunity cost associated with their capital investment. Specifically, this opportunity cost is the return the owners of a firm could make if their capital was invested elsewhere. This is an entirely forward-looking notion and has no relevance to the capital costs on a firm's books.[50] Accounting costs, however, have little if any similarity to the actual or economic costs of a firm. Therefore, it is expected that actual or economic profits will differ from accounting profits.

Actual or economic costs reflect a resource's market value that is objective and reflects the cost of providing an incremental unit of a good or service. In the case of capital investment, the replacement cost would be incurred going forward. It is an important concept in that resources will not be allocated to their highest-valued uses if accounting costs are the basis upon which resources are deployed.

Aside from the economic meaning of the term "actual," additional reasons exist to explain why one must conclude that actual, as defined in the statute, cannot be interpreted or limited strictly to embedded costs. Upon reading the statute, one is left to conclude that the term "actual" must encompass a much broader interpretation. The statute mandates that the FCC establish a just and reasonable rate. From this, one cannot conclude that rates must be based on historical embedded capital costs. To suggest such a course of action is tantamount to claiming that the just and reasonable standard can be met only by employing embedded costs, which clearly is not the case. Numerous agencies and courts have affirmed the principle that the result, not the framework, determines whether a rate is just and reasonable.[51]

It is clear that the just and reasonable standard does not limit the ratemaking process to

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50 See Hal Varian, *Microeconomic Analysis*, Third Edition, p. 23, and Robert S. Pindyck and Daniel Rubenfeld, *Microeconomics*, 1989, p. 270.

51 See, for example, *Federal Power Commission v. Hope Natural Gas Co.*, pp. 602, 605. In this decision the Supreme Court declared that "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling."

historical embedded costs. It is equally clear that the FCC has significant discretion in establishing rates. The current inquiry is evidence of this fact. One issue the FCC must address is how the cost of pole removal should be treated. In particular, the FCC must determine whether these costs should be removed from the accumulated depreciation account. Without regard to whether this is appropriate, the decision to include or exclude these costs will alter utilities' embedded cost structures. If the FCC was forced to rely exclusively on embedded costs, this would not be an option open to debate. The FCC has also considered employing gross instead of net costs capital for ratemaking purposes. Again, if the FCC had no discretion and was forced to adhere strictly to a embedded cost concept, such options would not be available. However, the FCC does have discretion and should employ a capital cost concept consistent with the economic interpretation of actual and the clear precedents already established in the Interconnection Order. The FCC, in the Local Competition Order, has already enunciated why a forward-looking concept is important. The importance of employing replacement costs lies in the adverse consequences to economic efficiency that result if embedded, rather than forward-looking, costs are employed.

B. *The Consequences of Not Employing Forward-Looking Capital for Poles and Conduits*

The consequences of not employing a forward-looking cost of capital as a means of calculating rates for pole attachments and conduit access can really be thought of as the flip side of doing so. That is, by not employing this proper concept of capital, the subsequent rate structure will:

- Not emulate competitive market prices;
- Not efficiently allocate pole and conduit capacity;
- Not serve as a relevant barometer to trigger efficient entry and exit in the market; and
- Inappropriately subsidize or burden one party.

1. <u>Inability to Emulate Competitive Market Prices</u>

A utility's historical costs have no relevance to current or prospective market conditions.

These costs do not reflect the cost structure faced by a competitive entrant. If used to establish a rate, the historical costs of a utility will not promote allocative or productive efficiency. As previously mentioned, allocative efficiency is achieved through competitive prices in that goods and services are allocated to those who value them the highest. If a rate is based on historical costs that are far below replacement costs, the rate will fall far short of the competitive market equivalent price. As a result, the good or service is not allocated to those who value it the highest, but rather to the first entity in line for the favorable rate. Unfortunately, the firm first in line is not necessarily the most efficient firm, which has long-term negative consequences. When rates are so far below their competitive market value, inefficient firms are shielded from the competitive pressure of more efficient firms. Society's best interests are not served when inefficient firms are shielded from competition. In the present case, an inefficient cable or telecommunications company could acquire access to a utility's pole or conduit at a below-market rate simply by being first in line and could do so at the expense of a more efficient company in that limited pole and conduit space is available. Ultimately, the inefficient cable or telecommunications company could go out of business, leaving an inoperable system. It might be prohibitively expensive to remove the inoperable system, thus preventing other cable or telecommunications companies from utilizing the pole or conduit space. In this case, the negative consequence arose because the resource was allocated neither to that firm which valued it the highest nor to that firm with the most efficient system.

2. <u>Misallocation of Pole and Conduit Capacity</u>

If resource prices do not equate to competitive levels, the resource will either be under-utilized or over-utilized. In the case where prices are set above competitive levels, the resource will be under-utilized. The value of the resource will be relatively more expensive than alternatives, thus leading consumers to direct their purchases to the lower-priced alternative. In the long run, a vast oversupply of the resource will develop as its demand drops. Conversely, if prices are set below competitive levels, consumers will be motivated to employ the resource at the expense of alternatives that are most likely more economically efficient. In the long run, the resource will be over-utilized and in excess demand as owners of the resource decrease investment.

In the case of poles and conduits, the consequences are clear. If prices are below competitive levels, attachers will find poles and conduits the more attractive alternative. Pole and conduit capacity will be over-utilized relative to alternatives. The over-utilization has both short and long-run consequences. In the short run, the use of pole and conduit capacity will be distorted in that it will not be allocated to its highest-valued use. In the long run, this distortion will remain. However, in addition, the investment in alternatives will be thwarted. In pricing pole and conduit capacity below competitive levels, excess demand will be created and with it excess supply in the alternatives to poles and conduits. As a result, investment in alternatives will be diminished, thus long-term growth will be hindered. Absent competitive market pricing, the industry will not develop efficiently.

The development of alternatives to poles and conduits is important for two reasons. First, for a long-term viable market to develop, sufficient alternatives must exist. Lacking sufficient alternatives, the FCC will find itself regulating rates and services for poles and conduits in perpetuity. As the number and quality of alternatives to poles and conduits decline due to hindered investment, the appropriateness of employing market-based pricing will fall. At the same time, the utilities will have no incentive to expand capacity on poles or conduits, thus leading to a long-term decline in these resources. Ultimately, the growth of the cable and telecommunications industry will be affected by both developments.

3. Inadequate Barometer for Entry and Exit

In addition to acting as signals for efficient resource allocation, competitive prices also serve as signals on which firms base their decisions to enter and exit a market. The issue of the signal value for entry and exit applies to entry by cable and telecommunications companies as well as entry by firms offering alternatives to utility poles and conduits. In deciding to enter a market, a cable or telecommunications company seeking access to a utility pole or conduit capacity will factor in the projected revenues and cost associated with serving a particular market. If prices for pole or conduit capacity are below competitive levels, the costs associated with entering the market will necessarily be understated and, as such, make entry more attractive. If priced competitively, the cable or telecommunications company might have chosen an alternative. As demand for alternatives declines, firms' incentive to provide those alternatives will decline as well, and will be manifested as a decrease in market entry.

4. Subsidies and Burdens from Inappropriate Pricing

The preceding discussion focused primarily on the economic efficiency consequences that result when pole and conduit capacity is not priced at competitive levels. In addition to these consequences, it must be recognized that rates not based on forward-looking economic costs will necessarily subsidize one party to the negotiations at the expense of the other. In the present case, if prices are below competitive levels, the electric utilities are providing a direct subsidy to the stockholders of the cable and telecommunications companies.

When prices for regulated goods and services are not equal to competitive market prices, an economic rent is created. Loosely defined, economic rent is the difference between the market value of a good and the cost incurred by the owner in bringing it to market. In the present case, the economic rent is the difference between the market value of poles and conduit capacity and the established cost-based rate. In competitive markets, the owners of the resource generally enjoy any economic rent.

The issue of economic rent arises frequently in regulated environments. For example, some natural gas pipelines in the Western United States are almost fully depreciated, resulting in a net book value of almost zero. As these are cost-based pipelines, the rates charged to their customers reflect little more than the variable operating costs incurred to run the pipeline. Although the rate for these pipelines might be minimal, their market value can be substantial. Thus, a sizable economic rent is created. As the pipeline customers pay the cost-based rate, they enjoy the economic rent associated with the pipeline.

If rates for pole and conduit capacity are set far below competitive market levels, a sizable rent will be created and will not be enjoyed by the owners of the assets. In short, the utilities will subsidize the stockholders of the cable and telecommunications companies in an amount equivalent to the economic rent associated with the assets. As the electric utilities are the owners of these assets, they, not the stockholders of the cable and telecommunications companies, should enjoy the economic rent associated with the poles and conduits.

As described in Section VI, the presence of PBR and the reality of electric industry restructuring provide a strong motivation for the electric utilities to keep their distribution costs low. This is achieved, in part, by aggressively marketing available capacity on poles and conduits. The benefit from successfully marketing this capacity and keeping distribution costs low is shared both by the customers and stockholders of the electric utilities. Thus, to the extent that rates are significantly below market levels, both the utilities' stockholders *and customers* are, in effect, subsidizing the stockholders of cable and telecommunications companies.

One might be tempted to argue that the utilities' stockholders and customers are not subsidizing the stockholders of the cable and telecommunications companies. Rather the subsidy is really a benefit to the customers of these companies who enjoy lower prices. This is an ill-founded argument. This argument implicitly assumes that the subsidy received by the cable and telecommunications companies is passed dollar-for-dollar through to their customers. There is nothing to indicate that this is the case. These are not cost-of-service-based regulated companies. Thus, cost savings are not passed through to their customers dollar-for-dollar. As in any unregulated market, the "incidence" of any cost savings or shifting will depend, in part, on the relative elasticities of demand and supply. For example, assuming the demand for cable services is relatively inelastic, one can assume that any cost savings will be primarily retained by the cable company stockholders. One might also be tempted to argue that even if the customers of electric utilities are subsidizing the cable and telecommunications customers, there is little harm simply because they are likely one in the same group. Again, this is an ill-founded argument. There is absolutely nothing to guarantee that the two groups of customers are even remotely related.

In some cases, the benefit of the subsidy enjoyed by cable and telecommunications companies is even more direct than that just described. There is the possibility that the cable and telecommunications companies can generate direct benefits from the resell of pole and conduit capacity obtained from the electric utilities. For example, there have been instances in which a pole attacher has, without the consent of the utility, "over-lashed" a new cable on an existing attachment and not compensated the utility. Clearly, the existing attacher derives a direct benefit whether the overlashed cable is owned by the company or is attached for the benefit of a third party. In the latter case, the existing attacher is "renting" his capacity on the pole and receiving revenue at a market-based price, but only paying a low, embedded cost rate. Aside from over-lashing, existing capacity holders also have the opportunity to resell any unused system capacity they might have. In fact, in the course of obtaining access to a utility's poles or conduits, an entity might find it advantageous to "over-build" its system with the express intent of reselling available capacity on its cable or fiber network. The motivation to over build is driven directly by the fact that the embedded cost rate for capacity does not reflect, and is quite lower, than the market price for capacity. If successful at reselling capacity, the cable and telecommunications companies effectively capture the full economic rent associated with the capacity to the detriment of the utility's stockholders and customers.

In this section the need for replacement costs versus embedded historical costs was discussed. The FCC has clearly embraced the former in the past and does so now. In the absence of rates calculated using replacement costs, significant distortionary costs will arise and the large cable and telecommunications companies will reap a substantial subsidy at the expense of utility customers.

Conclusion

The 1996 Act was a sweeping endorsement of market-based solutions. The FCC, in its recent pricing decisions for ILECs, has embraced this theme and should do the same for pole attachments and conduit access. The findings of this report support such a position. This report has described the evolution of the cable and telecommunications industries and has outlined the relevant analytical criteria that should be considered when evaluating the appropriateness of a negotiated rate framework. A number of conclusions were drawn. First, the cable and telecommunications industries are mature and consist of well-established, financially strong companies that are capable of effectively negotiating with electric utilities. Second, the poles and conduits owned by electric utilities cannot be considered as essential facilities as a myriad of alternatives are available to cable and telecommunications companies. In light of the alternatives available and the competitive posture of electric utilities vis-à-vis cable and telecommunications companies, negotiated rates should be allowed. If negotiation is allowed to govern transactions between electric utilities and cable and telecommunications companies, the market distortions resulting from the use of inefficient embedded cost ratemaking will be eliminated.

If the FCC chooses not to pursue a negotiated market-based solution, a cost-based ratemaking formula that recognizes the forward-looking replacement cost of invested capital should be employed. A rate structure employing forward-looking economic costs is entirely consistent with what the FCC has adopted for ILECs and can be expected to enhance economic efficiency.

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Attachment S
3rd Affidavit of Michael R. Dunn

THE CABLE TV FINANCIAL DATABOOK 2000

THE AUTHORITATIVE INDUSTRY SOURCEBOOK PUBLISHED BY **PAUL KAGAN ASSOCIATES, INC.**

PUBLISHER'S LETTER

As this letter went to press, the Justice Department finally approved AT&T's early 1999 acquisition of MediaOne, leaving it to the FCC to also approve—which it did on June 5. But the FCC said the deal could go through only if AT&T chose one of the following three divestiture options by December, with actual divestiture by May 19, 2001:

1. Sell MediaOne's 25.5% interest in Time Warner Enterprises (about 2.15 mil. net-owned subscribers, by PKA estimates).
2. Sell enough MediaOne subscribers to comply with the FCC's rule that no MSO can own more than 30% of the nation's estimated 84 mil. cable/DBS subscribers. According to the FCC, AT&T would have to sell 9.4 mil. subs. But if you count only net-owned subs, AT&T has a mere 22% market share. The FCC's simplistic formula double- and triple-counts subs, including those over which AT&T has no influence.
3. Divest the Liberty Media tracking stock. This seemed like the most logical choice for AT&T, but it was uncertain at presstime if the FCC deadlines were in conflict with the tax laws that governed the original AT&T/Liberty merger.

Meanwhile, the Consumers Union, which had lobbied for certain divestiture of the TWE stake, was angered by the FCC's decision and threatened to sue the Commission and lobby Congress to remove the FCC's power to approve mergers. Ironically, the sooner AT&T could gain greater scale, the sooner it would be able to offer the public lower prices on bundled video, voice and data services.

The Open Access issue that had plagued cable in the second half of 1999 seemed to have been lanced when AOL—its main proponent—cut its deal with TW to become an MSO [illegible]. But consumer advocates said Justice's language in approving the MediaOne acquisition by AT&T opened up that pandora's box again. Meanwhile, Open Access became a hot button in Europe, where regulators are wary of Microsoft's investment in three of the four largest operators in that sector.

Sound complex? It is, and will get more so, as companies morph from "operators" of certain services to "providers" of all services. As the 2Ks unfold, we will all come to learn about relative speeds for sale, availability and cost of bandwidth, pricing per megabit, call packages, service bundles and—often—pure price competition. The spoils of the broadband wars are people's eyes, ears and hands; the fight for them has just begun.

On a fundamental level, cable MSOs have fared well despite the growth of competition and all the publicity it gets. The industry wound up 1999 with an estimated 67.3 mil. subs, up 1.8% over the prior year's 66.1. Average monthly revenue/sub was $45.42 and total industry revenue was $37 bil. That's up from $33.30/month and $23 bil. five years ago, when the FCC was cracking down on rates.

Overbuilders have been attracted by cable's lofty position. They theorize that it's more sensible to build a subscriber for $2,500 than to buy one for $5,000. But cable's position is strengthened by its cash flow, its vastly improved service record and, in many markets, its first mover advantage in telephony, high-speed data and interactivity. MSOs are not the sitting ducks they were five years ago and $14 bil. in revenue lower. They're not invulnerable, but where they have cleaned up their digital, programming and service act, they remain tough to beat.

In the latest update of our 10-year projections, we see 59 mil. digital set-top boxes in the field by 2010, with 31 mil. cablephone subs and 25 mil. high-speed modem users as well as 72 mil. basic cable customers. That adds up to a $115 bil. revenue industry and per-home, per-month expenditure of $123.

The facts and figures behind this analysis and these predictions is contained in the pages that follow, arranged for your constant reference in the year ahead by Executive Editor Sharon Armbrust, Managing Editors Michele D. A. Nizza and Angelica Martinez, Project Coordinator Tanya Miranda, Analyst Elaine Blaisdell-Taylor, Production Manager Sandie Borthwick and a host of Kagan analysts and staffers who work hard to capture and create this valuable data. My thanks go to them and to our many readers and clients for continuing to join us on our research journey.

Sincerely,

Paul Kagan

Paul Kagan

THE OPERATING MARKET

In 1Q 2000, cable operators stepped on the gas pedal for big sales of digital, high-speed access and telephony services after several years of upgrades and momentum building. Many are reporting significant new RGUs (revenue generating units), and in most cases, at rates that exceed their own and investor expectations. . . Cox added 1 mil. new RGUs and increased its digital target from 1 mil. to 1.25 mil. by year-end.

For the year-ended December 1999, basic subs grew 1.8% to 67.3 mil. and average revenue per basic cable subscriber increased 7.0% to $45.48. The industry's total revenue from all operations rose 10.8% to $37.4 mil. But the real story is in the new services sector. Here are some highlights:

- High-speed-data revenue grew186.9% to $482 mil. with 1.4 mil. customers across the industry, up from 600,000 a year ago.
- Digital service continues to blow away expectations. Industry wide, digital service revenue increased 365.8% to $457 mil., up from $98.2 mil. at December 1998. Digital subs increased to over 5.1 mil. from just 1.4 mil. at year-end 1998. Digital is driving pay TV sales, which at some companies saw the first uptick in subscribers in several years.
- Residential telephony revenues increased 278.4% year-over-year, ending at $110 mil., up from $29 mil. the year before. And, the expectations for 2000 are high, even before IP telephony takes root.

AT&T's pending acquisition of MediaOne (now expected to close this summer) will likely involve AT&T selling off more subscribers to satify Justice Department objections. That, in turn, should jumpstart some telephony ventures between AT&T and other MSOs, tied to subscriber trades.

AT&T's telephony runrate is ramping fast, but it has set a very high bar for itself of 400,000-500,000 customers by December 2000. Its net adds climbed from 50 per day in December 1999 to 800 per day by mid May. But to get to 400,000 subs, it has to almost double that rate for the rest of the year. Wall Street's skepticism of that execution shows up in AT&T's stock price, $34.875 as of May 23, 2000, off 42.3% from its 52-week high of $61.00 on March 29, 2000. News of sagging results in the consumer long distance market has overshadowed the broadband progress.

The company told investors on May 17 that it would meet its financial and operating targets for the year. Its high-speed data and cablephone or advanced new service RGUs were up 310,000 in 1Q 2000, with installs at 1,500 per day in March and climbing rapidly. So far, its announcement hasn't helped the stock. . . Wall Street investors want T to show them the money.

The downside of cable's successful rollout of new services has been a balky supply chain that could throw a wrench into the cable digital success story. As competition grows stronger by the day, an operator's backlog can quickly become a competitor's customer. That's why the global shortage of components for set top boxes and cable modems has compounded the 2000 bear market for cable stocks. Despite the 1Q and 2Q shortage, vendors suggest they will ship double and triple last year's numbers. And, MSOs have found market demand for their services that will soak up that supply and then some. Just give them the equipment.

The Operating Market section of *THE CABLE TV FINANCIAL DATABOOK* provides projections for the cable industry, including digital video tiers, video-on-demand, high-speed Internet access, cable telephony and more. It also features cable-specific operating and balance sheet information for the major MSOs. Rankings and directories for the largest MSOs and systems in the country are also included, as well as historical statistics on many cable metrics—units, revenues for basic, pay, advertising and much more.

HISTORY OF CABLE TV SUBSCRIBERS AND REVENUES

Year	Avg. Basic Subs	Avg. Basic Mon. Rate	Basic Rev.	Basic Install Rev.	Avg. Pay ** Units	Avg. Mini-Pay ** Units	Avg. Monthly Pay Rate	Avg. Monthly Mini-Pay ** Rate	Total Pay Rev.	Pay Install Rev.	Expanded Basic † Rev.	Misc. * Rev.	Total Rev.	% Chg.
	(mil.)	($)	------($ mil.)------		---------(mil.)---------		-----------($)-----------		-------------------------($ mil.)-------------------------					
[illegible]	0.25	5.00	15	5	—	—	—	—	—	—	—	—	20	—
1960	0.75	5.00	45	9	—	—	—	—	—	—	—	—	54	168.0
1965	1.50	5.00	90	14	—	—	—	—	—	—	—	—	104	94.2
1970	5.10	5.50	337	61	—	—	—	—	—	—	—	—	398	282.0
1975	9.80	6.50	764	89	0.305	—	7.85	—	29	1	—	—	883	122.1
1976	11.00	6.45	851	49	0.724	—	7.71	—	67	1	—	—	969	9.7
1977	12.20	6.86	1,004	53	1.310	—	7.92	—	125	2	—	58	1,241	28.2
1978	13.40	7.13	1,147	57	2.466	—	8.01	—	237	3	—	70	1,513	21.9
1979	15.00	7.40	1,332	67	4.511	—	8.27	—	448	5	—	90	1,942	28.3
1980	17.50	7.69	1,615	86	7.438	—	8.62	—	769	8	—	130	2,609	34.3
1981	21.10	7.99	2,023	111	12.297	—	8.92	—	1,316	14	21	190	3,675	40.9
1982	25.25	8.30	2,515	131	18.121	—	9.30	—	2,022	19	76	269	5,032	36.9
1983	29.43	8.61	3,041	144	23.605	—	9.70	—	2,748	22	168	363	6,485	28.9
1984	32.80	8.98	3,534	145	27.609	—	9.96	—	3,300	22	254	483	7,738	19.3
1985	35.44	9.73	4,138	144	29.350	—	10.25	—	3,610	21	299	619	8,831	14.1
1986	38.17	10.67	4,887	153	30.450	—	10.31	—	3,767	20	400	727	9,955	12.7
1987	41.16	12.18	6,016	166	32.250	—	10.23	—	3,959	22	376	1,023	11,562	16.1
1988	44.17	13.86	7,346	176	36.160	—	10.17	—	4,413	27	269	1,286	13,516	16.9
1989	47.50	15.21	8,671	190	39.957	—	10.20	—	4,891	30	265	1,563	15,609	15.5
1990	50.52	16.78	10,174	196	41.300	—	10.30	—	5,105	27	500	1,828	17,829	14.2
1991	52.57	18.10	11,418	190	40.703	2.80	10.27	1.50	5,067	25	705	2,141	19,545	9.6
1992	54.30	19.08	12,433	225	40.300	3.23	10.17	1.50	4,976	85	1,003	2,300	21,022	7.6
1993	56.22	22.49	13,534	240	41.850	3.63	9.11	2.40	4,680	88	1,570	2,629	22,741	8.2
1994	58.47	21.62	15,170	259	42.314	4.40	8.83	2.63	4,623	92	†	3,224	23,368	2.8
1995	60.90	23.07	16,860	271	43.051	5.37	8.54	2.75	4,589	96	†	3,585	25,401	8.7
1996	62.80	24.41	18,395	282	45.265	6.26	8.35	2.50	4,723	97	†	4,239	27,737	9.2
1997	64.14	26.48	20,380	294	46.229	6.43	8.29	2.75	4,811	98	†	4,895	30,478	9.9
1998	65.42	27.81	21,831	309	47.043	5.65	8.20	3.50	4,866	100	†	5,897	33,003	8.3
1999	66.66	28.92	23,134	322	47.780	5.05	8.28	3.95	4,990	102	†	7,786	36,333	10.1

*** Revised.*

** Miscellaneous revenue includes the following, with the beginning date in parenthesis: advanced analog (1995), digital (1996), home shopping (1984), advertising (1980), pay-per-view (1984), equipment charges (1977), high-speed access (1996), residential cablephone (1997) and new services (1995).*

† Beginning with 1994, basic and expanded basic rates and revenue combined as regulated basic revenue.

TOP CABLE SYSTEM OPERATORS AS OF DECEMBER 1999

(Ranked by Basic Subs)

Rank	Company	Basic Subs	Expanded Basic	Pay Units	Mini-Pay Units	Homes Passed	% Penetration Basic/HP	% Penetration Pay/Basic	% Penetration Pay/HP
		(000)					(%)	(%)	(%)
1	Time Warner Cable [1]	12,600.0	12,348.0	7,560.0	0.0	21,300.0	59.2	60.0	35.5
2	AT&T BIS [2]	11,400.0	8,892.0	9,576.0	4,309.2	19,700.0	57.9	84.0	48.6
3	Comcast Cable Communications [3]	5,719.8	0.0	5,774.9	0.0	9,522.0	60.1	101.0	60.6
4	Charter Communications [4]	5,458.3	4,572.5	2,733.5	125.0	8,866.0	61.6	50.1	30.8
5	Cox Communications [5]	5,136.2	4,634.0	3,237.0	130.5	8,031.3	64.0	63.0	40.3
6	MediaOne [6]	4,993.0	0.0	4,392.0	0.0	8,560.0	58.3	88.0	51.3
7	Adelphia Communications [7, e]	4,990.1	1,259.6	2,354.7	102.5	7,740.0	64.5	47.2	30.4
8	Cablevision Systems [8]	3,492.1	3,260.8	7,715.2	0.0	5,200.1	67.2	220.9	148.4
9	Lenfest Communications [9, e]	1,094.3	1,137.0	718.2	0.0	1,477.9	74.0	65.6	48.6
10	Insight Communications	929.7	0.0	755.0	0.0	1,511.6	61.5	81.2	49.9
	CableOne	739.9	0.0	423.1	0.6	1,025.8	72.1	57.2	41.2
	MediaCom, LLC [10]	700.0	0.0	587.0	0.0	1,008.0	69.4	83.9	58.2
13	Bresnan Communications [11, e]	662.1	582.6	295.4	119.7	993.0	66.7	44.6	29.8
14	Prime Cable [12, e]	545.8	497.7	386.9	34.6	1,074.9	50.8	70.9	36.0
15	Multimedia Cablevision (Gannett) [13]	523.3	410.9	439.4	0.0	845.4	61.9	84.0	52.0
16	Classic Cable	356.0	0.0	155.0	0.0	605.0	58.8	43.5	25.6
17	Service Electric	302.1	0.0	89.3	0.8	430.7	70.2	29.6	20.7
18	Ameritech Corporation [14]	300.0	0.0	0.0	0.0	1,000.0	30.0	n/a	n/a
19	RCN Corporation [15]	292.2	213.3	0.0	0.0	551.0	53.0	n/a	n/a
20	Tele-Media Corporation	266.0	0.0	85.0	0.0	357.1	74.5	31.9	23.8
21	Northland Communications	260.9	246.0	76.3	15.9	413.1	63.2	29.2	18.5
22	Garden State Cablevision [16, e]	211.9	0.0	134.2	0.0	305.5	69.3	63.4	43.9
	Armstrong Group of Co.	204.9	68.5	80.9	5.7	258.9	79.1	39.5	31.3
24	Susquehanna Cable	187.4	151.6	75.8	0.0	243.5	77.0	40.5	31.1
25	Millennium Digital Media	174.0	169.1	108.1	4.8	297.7	58.4	62.1	36.3
26	Galaxy Cablevision	166.6	0.0	75.5	0.0	362.3	46.0	45.3	20.8
27	Prestige Cable [17, e]	165.7	156.9	85.0	0.0	226.0	73.3	51.3	37.6
28	Blade Communications	160.9	157.6	64.4	168.8	257.2	62.6	40.0	25.0
29	Pencor Services [e]	160.0	0.0	70.0	0.0	175.0	91.4	43.8	40.0
30	U.S. Cable Corporation [*]	141.0	114.2	64.0	0.0	238.0	59.2	45.4	26.9
31	Midcontinent Cable Co.	131.7	21.6	49.2	0.0	210.4	62.6	37.4	23.4
32	GS Communications	118.6	113.2	50.7	0.0	154.7	76.7	42.8	32.8
33	General Communications	116.7	102.7	84.7	0.1	174.0	67.1	72.6	48.7
	Wehco Video [e]	114.9	94.3	39.7	0.0	168.0	68.4	34.6	23.6
	Peak Cablevision [18]	113.0	52.1	45.0	59.0	182.6	61.9	39.8	24.6
36	R & A Management, LLC	96.8	70.7	45.9	0.0	147.4	65.7	47.4	31.1
37	Knology Holdings	87.0	82.7	63.1	0.0	295.3	29.5	72.5	21.4
38	Schurz Communications	86.3	76.2	50.0	0.0	102.9	83.8	58.0	48.6
39	Chambers Communications Corporation [19]	82.0	0.0	17.4	0.0	125.7	65.2	21.2	13.9
40	Daniels	72.1	66.9	36.3	0.0	90.6	79.6	50.3	40.1
41	James Cable	71.9	0.0	22.0	0.0	129.6	55.5	30.7	17.0
42	NPG Cable [e]	69.8	13.1	24.2	0.0	90.8	76.9	34.6	26.6
43	Cable Mgmt Assoc. [e]	68.8	19.0	30.2	0.4	122.5	56.2	43.9	24.7
44	USA Media	64.6	50.0	20.4	3.2	99.5	64.9	31.6	20.5
45	Moffat Communications	63.7	58.6	41.6	0.0	85.0	75.0	65.3	48.9
46	Benchmark Communications [#]	59.0	33.2	35.3	4.4	103.3	57.1	59.9	34.2
47	Star Cable Assoc. [20, e]	58.6	42.0	21.3	0.5	97.5	60.0	36.4	21.9
48	Pegasus Cable TV	55.1	0.0	11.1	0.0	168.0	32.8	20.2	6.6
49	Joseph Gans Cable TV [e]	49.4	46.4	19.3	0.0	60.0	82.3	39.0	32.1
50	Catawba Services	48.0	43.0	25.0	0.0	77.6	61.9	52.0	32.2
51	Eastern CT Cable	46.9	45.7	17.0	13.1	57.9	81.1	36.3	29.4
52	Anderson Eliason Cable Group	46.7	1.7	14.4	0.0	82.7	56.4	30.8	17.4
53	Massillon Cable	45.4	30.4	14.6	0.0	55.4	81.9	32.3	26.4
54	CableAmerica	45.0	43.0	26.0	0.0	96.0	46.9	57.8	27.1
55	Sunflower Cablevision	31.4	6.9	3.5	5.7	39.0	80.6	11.1	9.0
56	Americable, Intl.	29.0	0.0	10.0	0.0	68.0	42.6	34.5	14.7
57	New England Cablevision	25.7	24.2	11.1	0.0	30.1	85.4	43.0	36.7

continued...

MSO OPERATING DATA PER SUBSCRIBER

In this section of *THE CABLE TV FINANCIAL DATABOOK*, we break out the fundamental operating statistics for the cable divisions of 12 public companies. We have gathered the data through a careful review of corporate annual reports and discussions with corporate executives. The information is arranged to provide easy analysis of the MSO's revenue, cash flow and debt, as well as comparisons of the data on a per-subscriber basis.

The subscriber and financial data for each company refers only to net-owned subs and consolidated cable operating results. The data represents fiscal year 1999 operating results, unless otherwise noted.

SUBSCRIBER DEBT ANALYSIS—1999

(Ranked by Cable Debt per Subscriber)

Company	Total Cable Debt ($ mil.)	Floating Rate Debt ($ mil.)	Floating Rate Debt As % Total	Fixed Rate Debt ($ mil.)	Cable Debt/ Basic Sub ($)	Cable Debt/ HP ($)	Cable Debt-to-CF Ratio (x)	Fixed Charge * Coverage
MediaCom	1,139	814	71	325	**3,188**	2,165	17	2
MediaOne	9,175	1,740	19	7,435	**1,853**	1,072	9	2
Adelphia	8,447	2,323	28	6,124	**1,707**	1,094	7	1
Cablevision Systems	5,228	10	0	5,218	**1,690**	1,135	6	1
Cox Communications	6,376	515	8	5,861	**1,661**	794	8	1
Charter Communications	8,936	4,791	54	4,145	**1,469**	907	6	3
Classic Communications	525	265	51	260	**1,276**	743	7	2
Insight Communications #	471	471	100	0	**1,118**	708	5	2
Comcast	4,735	1,365	29	3,370	**833**	497	3	2
Time Warner Cable	10,156	2,856	28	7,300	**806**	493	4	3
Rogers Communications @	1,311	0	0	1,311	**586**	466	3	1
CableOne	12	0	0	12	**16**	12	0	n/r
TOTALS	**56,511**	**15,150**	**27**	**41,361**	**996**	**599**	**5**	**2**

FREE CASH FLOW ANALYSIS—FISCAL 1999

(Ranked by Free Cash Flow)

Company	Cable CF ($ mil.)	Capital Expenditures ($ mil.)	** Interest Expense ($ mil.)	** Preferred Dividends ($ mil.)	** Taxes ($ mil.)	** Common Dividends ($ mil.)	*** Free CF ($ mil.)
Charter Communications	1,424.8	741.5	477.8	0.0	1.0	**0.0**	**204.5**
Comcast	1,409.0	773.8	353.0	0.0	75.8	**6.8**	**199.6**
CableOne	140.2	62.6	0.0	1.0	22.7	**8.0**	**46.0**
Adelphia	1,145.2	366.0	700.0	42.0	0.0	**0.0**	**37.2**
Classic Communications	77.6	32.4	40.8	0.0	0.0	**0.0**	**4.4**
MediaCom	67.9	86.7	37.8	0.0	0.0	**0.0**	**(56.6)**
Cablevision Systems	807.1	414.0	465.7	0.0	0.0	**0.0**	**(72.5)**
Time Warner Cable	2,466.0	1,600.0	818.0	0.0	150.0	**0.0**	**(102.0)**
Insight Communications	89.8	113.7	50.4	0.0	31.6	**0.0**	**(106.0)**
Rogers Communications @	390.6	413.5	257.5	9.3	0.0	**0.0**	**(289.6)**
Cox Communications	811.5	1,154.5	305.7	0.0	262.4	**0.0**	**(911.2)**
MediaOne	1,052.0	1,960.0	417.6	51.8	0.0	**0.0**	**(1,377.4)**
TOTALS	**9,881.8**	**7,718.7**	**3,924.3**	**104.0**	**543.5**	**14.7**	**(2,423.5)**

Note: With the exception of Cable One, Rogers and Time Warner, data is Pro Forma.

* *Fixed charge is cash flow divided by 1999 required principal payment plus interest expense expressed as a ratio.*

n/r = not relevant.

Excludes the Kentucky and Columbus System.

@ *In Canadian Funds.*

** *Pro-rata share of consolidated totals used where company has multiple business units with no breakouts.*

*** *Calculated: CF minus Interest Expense minus PFD Dividends minus Capital Expenditures.*

SUBSCRIBER TOTALS

(Ranked by 1999 Basic Subscribers)

Company	Basic Subs Begin	Basic Subs End	Basic Subs Average	Digital Subs Begin	Digital Subs End	Digital Subs Average	HSD Subs Begin	HSD Subs End	HSD Subs Average	Homes Passed
	(000)									
Warner Cable	12,600	**12,600**	12,600	0	430	215	180	550	365	20,600
Broadband	11,332	**11,400**	11,366	939	1,800	1,370	29	207	118	19,700
Charter Communications	6,033	**6,138**	6,085	0	155	78	5	66	35	9,853
Comcast	5,643	**5,720**	5,681	81	515	298	54	142	98	9,522
MediaOne	4,911	**4,993**	4,952	5	56	31	84	220	152	8,560
Adelphia	4,908	**4,990**	4,949	42	234	138	15	37	26	7,723
Cox Communications	3,754	**3,923**	3,838	75	351	213	67	187	127	8,031
Cablevision Systems	3,053	**3,135**	3,094	481	594	538	11	52	32	4,606
Rogers ©	2,237	**2,236**	2,237	0	41	21	54	186	120	2,812
CableOne	733	**740**	736	0	0	0	0	0	0	1,026
Insight Communications *	423	**419**	421	1	25	13	0	2	1	665
Classic Communications	410	**414**	412	1	4	3	0	0	0	707
MediaCom	354	**361**	357	0	5	3	0	1	0	526
TOTALS	**56,390**	**57,069**	**56,730**	**1,626**	**4,211**	**2,918**	**500**	**1,650**	**1,075**	**94,330**

SUBSCRIBER PENETRATION AND DOLLAR VALUES

(Ranked by Average Monthly Cash Flow per Subscriber)

Company	Basic Subs as % of HP	1999 Rev./Avg. Basic Sub ($)	Avg. Monthly Rev./Sub ($)	1999 CF./Avg. Basic Sub ($)	Avg. Monthly CF/Sub ($)	Cable Revenue ($ mil.)	Cable EBITDA ($ mil.)	CF Margin (%)
Cablevision Systems	68.1	615.2	51.26	260.8	**21.74**	1,903.5	807.1	42.4
Comcast	60.1	543.1	45.26	248.0	**20.67**	3,085.3	1,409.0	45.7
Charter Communications	62.3	480.8	40.06	234.1	**19.51**	2,925.7	1,424.8	48.7
Adelphia	64.6	468.6	39.05	231.4	**19.28**	2,319.3	1,145.2	49.4
Insight Communications *	63.0	455.7	37.97	213.1	**17.76**	191.9	89.8	46.8
MediaOne	58.3	519.4	43.28	212.4	**17.70**	2,572.0	1,052.0	40.9
Cox Communications	48.8	552.4	46.03	211.4	**17.62**	2,120.3	811.5	38.3
Time Warner Cable	61.2	426.5	35.54	195.7	**16.31**	5,374.0	2,466.0	45.9
AT&T Broadband	57.9	484.5	40.38	191.4	**15.95**	5,507.0	2,175.0	39.5
CableOne	72.1	456.6	38.05	190.5	**15.87**	336.3	140.2	41.7
MediaCom	68.6	428.0	35.67	190.1	**15.84**	152.9	67.9	44.4
Classic Communications	58.5	440.4	36.70	188.6	**15.71**	181.3	77.6	42.8
...s Communications ©	79.5	462.1	38.51	174.6	**14.55**	1,033.7	390.6	37.8
TOTALS	**60.5**	**488.3**	**40.69**	**212.5**	**17.71**	**27,703.1**	**12,056.8**	**43.5**

Note: With the exception of Cable One, Rogers and Time Warner, data is Pro Forma.

* *Excludes the Kentucky and Columbus System.*

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21ST CENTURY MEDIA AND TELECOMMUNICATIONS COMPETITION

21st Century Competition took on a whole new meaning on January 10, 2000 when AOL and Time Warner announced a $166 bil. merger, taking the telecommunications industry by surprise and opening up a Pandora's box of speculation about what their marriage would mean for cable companies, ISPs, and the convergence of all the other ancillary businesses both bring to the table.

Here's how big the story is. Cable's two largest companies—Time Warner and TCI—have been grabbed by behemoths in the online and telephone business which now have combined market caps of nearly $500 bil. It's a giant grab for household reach. . .AOL is the biggest subscriber company in the broadband business (24.5 mil.) but "passes" only 57 mil. households (with PCs). It wants Time Warner's and other cable's passings to switch its audience to high-speed connectivity, not to mention the content play and its own IP telephony designs.

AT&T wants cable passings for local, long-distance and wireless phone potential, data services, plus video play. AT&T's first telephony joint venture to come to fruition was announced March 16 with Insight. It may set a standard for mid-range MSO affiliations.

But the biggest coup for both of cable's newcomer leaders—AT&T and AOL—will be a resolution between them for capitalizing on data and telephony in tandem. We expect to see a growing array of mixed media marriages as old and new competitors with fiber, DSL, satellite and wireless bases race to harness as many distribution channels as possible.

Terms of the fist telephony JV call for Insight to give up an estimated one-third share of gross telephony revenue to AT&T—but earn a much higher profit margin—and cut its exposure to CapEx by 50%.

The MSO will bill its customers and pass the revenue through to AT&T, which, in turn, will pay Insight for each line, each install and each service call. The partners will split the upside 50-50. We'll likely see more of these types of deals as operators expand farther and farther beyond their core expertise and AT&T pushes to extend its local play nationwide.

The proliferation of digital video, high-speed data and telephony has irrevocably changed the cable landscape, transforming the one-way video business into a multi-service two-way broadband pipe. Our year-end survey of operators found 17 major MSOs which have launched or plan to launch digital service in 2000. Those reporting year-end 1999 numbers had more than 3.5 mil. digital subscribers, representing almost 70% of the 5 mil.+ digital tier subs at December 1999.

High-speed data customers refuse to go back to dial-up after trying the super fast service cable modems provide. Ops are launching the service across the U.S. as quickly as they can install the equipment. The 21 operators responding to our survey have launched in 612 communities across the U.S. and serve more than 1.4 mil. subscribers. We estimate HSD subs will hit 3.6 mil. by YE 2000.

Telephony deployments are moving along more slowly, with only seven MSOs reporting residential service offerings (4 have commercial deployments). System homes passed for the seven totaled 5.1 mil. But operators are ramping up coverage alongside the data rollouts, and the industry will be racing towards the one mil. cablephone customer benchmark by year end 2000, promising a full head of steam heading into 2001. Meanwhile, digital video and high-speed data gains are ahead of schedule. We are projecting over 11 mil. digital tier subs and 3.6 mil. HSD subs by the end of this year.

The 21st Century Competition section of *THE CABLE TV FINANCIAL DATABOOK* identifies the spots where competition is heating up first. It shows how cable companies are consolidating to compete on new fronts. It includes information on cable deployments of digital video, cable and DSL high-speed-data initiatives and cable business and residential phone markets. It also lists cable franchises awarded to competitors and subscriber statistics for DBS.

TELEPHONY DEPLOYMENTS BY CABLE OPERATORS

(Commercial Deployments)

Company	Total Buildings Connected	Route Miles	Launched		
Ac[illegible]a	2,194	16,060	Albany, GA	Huntsville, AL	Reno, NV
			Albany, NY	Indianapolis, IN	Richmond, VA
			Albuquerque, NM	Jackson, MS	Roanoke, VA
			Allentown, PA	Jacksonville, FL	Sacramento, CA
			Atlanta, GA	Kansas City, MO	Salem, OR
			Augusta, GA	Knoxville, TN	Salt Lake City, UT
			Austin, TX	Las Vegas, NV	San Antonio, TX
			Baltimore, MD	Lexington, KY	San Diego, CA
			Baton Rouge, LA	Lincoln, NE	San Francisco, CA
			Bethlehem, PA	Little Rock, AK	San Jose, CA
			Birmingham, AL	Long Island, NY	Santa Fe, NM
			Boise, ID	Los Angeles, CA	Savannah, GA
			Boston, MA	Louisville, KY	Scranton/Wilkes Barre, PA
			Buffalo, NY	Madison/Milwaukee, WI	Seattle, WA
			Charleston, SC	Memphis, TN	Shreveport, LA
			Charlotte, NC	Mobile, AL	South Bend, IN
			Charlottesville, VA	Modesto, CA	South Florida
			Chattanooga, TN	Monroe, LA	Springfield, IL
			Cheyenne, WY	Montgomery, AL	Springfield, MO
			Chicago, IL	Montreal, Canada	St. Louis, MO
			Cincinnati, OH	Nashville, TN	State College, PA
			Cleveland, OH	New Jersey	Syracuse, NY
			Columbia, SC	New Orleans, LA	Tallahassee, FL
			Columbus, OH	New York, NY	Tampa, FL
			Coudersport, PA	Norfolk, VA	Topeka, KS
			Dallas, TX	Oklahoma City, OK	Tri-City Area, TN
			Denver, CO	Omaha, NE	Tucson, AZ
			Des Moines, IA	Orlando, FL	Tulsa, OK
			Detroit, MI	Pensacola, FL	Utica/Rome, NY
			Easton, PA	Peoria, IL	Vermont
			Erie, PA	Philadelphia, PA	Washington Metro, DC
			Fort Wayne, IN	Phoenix, AZ	Wichita, KS
			Fort Worth, TX	Pittsburgh, PA	Wilmington, DE
			Fresno, CA	Portland, ME	Winston-Salem, NC
			Greensboro, NC	Portland, OR	York, PA
			Harrisburg, PA	Providence, RI	Yuma, AZ
			Hartford, CT	Raleigh, NC	
			Houston, TX	Reading, PA	
Cablevision	314	817	Long Island, NY		
Cox	1,513	n/a	Hampton Roads, VA	Oklahoma City, OK	Pensacola, FL
			Hartford, CT	Omaha, NE	Phoenix, AZ
			New Orleans, LA	Orange County, CA	San Diego, CA
Time Warner	n/a	n/a	Albany, NY	Indianapolis, IN	
			Austin, TX	Jersey City, NJ	
			Binghamton, NY	Manhattan, NY	
			Charlotte, NC	Memphis, TN	
			Cincinnati, OH	Milwaukee, WI	
			Columbus, OH	Orlando, FL	
			Dallas, TX	Raleigh, NC	
			Greensboro, NC	Rochester, NY	
			Honolulu, HI	San Antonio, TX	
			Houston, TX	San Diego, CA	
				Tampa, FL	

n/a – not available.

U.S. DBS SUBSCRIBER STATS

		1997				1998				1999			
		03/31	06/30	09/30	12/31	03/31	06/30	09/30	12/31	03/31	06/30	09/30	12/31
Subs													
DIRECTV	(000)	2,465	2,639	2,892	3,301	3,528	3,755	4,058	4,458	4,762	5,296	5,923	6,679
PRIMESTAR	(000)	1,661	1,747	1,809	1,946	2,079	2,117	2,166	2,296	2,359	2,183	1,707	1,364
EchoStar	(000)	480	590	820	1,040	1,202	1,382	1,609	1,940	2,265	2,597	2,972	3,410
Other •	(000)	92	100	87	99	103	104	116	126	136	0	0	0
Total	**(000)**	**4,698**	**5,076**	**5,608**	**6,386**	**6,912**	**7,358**	**7,949**	**8,820**	**9,523**	**10,076**	**10,602**	**11,453**
USSB ‡	(000)	1,378	1,455	1,584	1,740	1,799	1,842	1,929	2,028	2,192	0	0	0
Market Share													
DIRECTV	(%)	52.5	52.0	51.6	51.7	51.0	51.0	51.1	50.5	50.0	52.6	55.9	58.3
PRIMESTAR/DIRECTV &	(%)	35.4	34.4	32.3	30.5	30.1	28.8	27.2	26.0	24.8	21.7	16.1	11.9
Total DIRECTV Shares &	(%)	52.5	52.0	51.6	51.7	51.0	51.0	51.1	50.5	50.0	74.2	72.0	70.2
EchoStar	(%)	10.2	11.6	14.6	16.3	17.4	18.8	20.2	22.0	23.8	25.8	28.0	29.8
Other •	(%)	2.0	2.0	1.6	1.6	1.5	1.4	1.5	1.4	1.4	n/a	n/a	n/a
Net Adds													
DIRECTV •	(000)	165	174	253	409	227	227	303	400	304	389	627	756
PRIMESTAR/DIRECTV **	(000)	97	86	62	137	133	38	49	130	63	(176)	(476)	(343)
EchoStar	(000)	130	110	230	220	162	180	227	331	325	332	375	438
Other •	(000)	12	8	(13)	12	4	1	12	10	11	4	n/a	n/a
Total	**(000)**	**404**	**378**	**532**	**778**	**526**	**446**	**591**	**871**	**703**	**549**	**526**	**851**
USSB	(000)	158	77	129	156	70	43	87	99	164	45	n/a	n/a
Share of Net Adds													
DIRECTV	(%)	40.8	46.0	47.6	52.6	43.2	50.9	51.3	45.9	43.2	70.9	119.2	88.8
PRIMESTAR/DIRECTV &	(%)	24.0	22.8	11.7	17.6	25.3	8.5	8.3	14.9	9.0	(32.1)	(90.5)	(40.3)
EchoStar	(%)	32.2	29.1	43.2	28.3	30.8	40.4	38.4	38.0	46.2	60.5	71.3	51.5
Other •	(%)	3.0	2.1	(2.4)	1.5	0.8	0.2	2.0	1.1	1.5	0.7	n/a	n/a
Seasonal Stats: Net Adds in Quarter as a % of Net Adds for Calendar Year													
DIRECTV	(%)	16.5	17.4	25.3	40.9	19.6	19.6	26.2	34.6	14.6	18.7	30.2	36.4
PRIMESTAR	(%)	25.4	22.5	16.2	35.9	38.0	10.9	14.0	37.1	6.8	n/a	n/a	n/a
Echostar	(%)	18.8	15.9	33.3	31.9	18.0	20.0	25.2	36.8	22.1	22.6	25.5	29.8
USSB ‡	(%)	30.4	14.8	24.8	30.0	23.4	14.4	29.1	33.1	78.5	21.5	n/a	n/a
Industry	(%)	19.3	18.1	25.4	37.2	21.6	18.3	24.3	35.8	26.7	20.9	20.0	32.4

Notes: U.S. subscribers only. All DBS operators serve commercial accounts, but reporting differs. DIRECTV and PRIMESTAR subscribers include commercial accounts; EchoStar and USSB subscribers do not.

• A small percentage of Digital Satellite System (DSS) consumer households subscribing to USSB but not DIRECTV.

‡ Total paying USSB consumer households (including those taking DIRECTV).

& Medium power subcribers. DIRECTV completed its purchase of PRIMESTAR's medium power service on 04/29/99. The subscribers will gradually be transitioned over to DIRECTV's high power service.

*** Excludes USSB conversions.*

n/a = not applicable.

THE PUBLIC MARKET

The Kagan Cable MSO average out-performed the S&P 500 for the third straight year in 1999, with a total gain of 53.5% vs. the S&P's 19.5% increase. Our cable average performed half as well as last year, but given the fact it was up 100% in 1998 and 91% in 1997, it's not surprising the gro lost a little steam.

After two solid years of huge acquisitions, cable operators are now focused on putting into action their on-paper business plans. Wall Street is focused on earnings and results. . . anxious for long promised revenue and cash flow returns to finally be realized as new services are launched.

As the chart on page 98 shows, cable MSO shares lost their upward momentum in early 2000, while DBS shares have continued to soar to record heights and the S&P muddled alc without much movement. Familiar threats are affecting stocks—regulatory issues, DBS, fiber overbuilders—with an overlay of interest rate malaise and profit-takers thrown into the mix.

A number of factors have converged to accelerate the downward slide for both new cable IPO stocks and veteran public companies:

- Negative overall market conditions, especially interest-rate concerns and inflation concerns;
- The AT&T phenomenon: The overhang of the MediaOne deal, execution and integration concerns and its pummeled long distance business have put a pall over the entire group; and
- Competition from DBS, DSL, broadcasters, fiber overbuilders, fixed wireless and others.

As usual in a bear market, the fine execution by almost every cable company in adding basic subscribers in the face of increasing competition and simply blowing away their targets for digital, high speed data and even telephony for t . leaders in that field (Cox, Cablevision) has simply been ignored. Instead, it has been the bear's day, with cable stock group dropping a startling 34% from the January 21 all-time high, leaving our MSO Average down 28% for the year through May 22.

Operators must now be experts at not only providing advanced cable services, but also telephone and Internet services—while many are still integrating millions of new subscribers from recent acquisitions. And, they are hitting on all cylinders. Still, those investors looking to AT&T for guidance have been disappointed that its integration and conversion issues aren't easily resolved and some revenue streams may be further out than originally promised.

Cable operators reported high and accelerating take rates on new services during 1Q 2000, held back only by a shortage of cable modems and set top boxes. If this were still a bull market, the created backlog would be lauded as a high-class problem. But it will push some gains into 2001, and that is making investors nervous.

During the year, three new IPOs launched beginning with Insight in July, Charter in November, Classic in December. . . MediaCom priced in February 2000. Under the same scrutiny as other cable operators and marred by the threat of competition, the new issues have had a rough year, with all priced well below their IPO prices.

Classic has taken the hardest hit, down 71% to 7.25 on May 17 from its December IPO price of $25. MediaCom has also hit the skids, down 41.8% from its February IPO price of $19 to 11.06 on May 17, but up from bottoming at $7.63 on April 18. Insight and Charter have also plummeted, losing 41.8% and 32.6% off their respective IPO prices.

The downturn in cable stocks has created some resounding bargains. But with interest rates still headed north at mid-year 2000, the MSOs may continue to do better on Main Street than on Wall Street. All the more time for value hunters to average into broadband equities at bargain prices.

The Public Market Section of *THE CABLE TV FINANCIAL DATABOOK* provides a historical review of cable stock performance, various profile annual stock performance for operators and suppliers, including specific data points like current assets, liabilities and long-term debt. The section also includes a table breaking out institutionally held stock. In addition, this sections provides a detailed analysis of financial data for the 60 public operators and suppliers; including presentations of the following data: income statement, operating margins, profits and dividends, returns on investment, five-year revenue and net income, balance sheet information and plant and asset info.

THE MONEY MARKET

Despite interest rate uncertainties and market fluctuations, cable operators didn't have any trouble raising capital in 1999. In fact, they tapped the markets for record levels of debt and equity, as investors clamored to get a piece of the action promised by up-and-coming new-service revenue streams.

In 1999, cable companies raised more than two times the capital of 1998. And, for the first time in the 50-plus-year history of the industry, new equity sales matched public debt issues almost dollar for dollar—$13 bil. of new equity vs. $16 bil. of new public debt (net of $4 bil. of redemptions).

While there's probably never been a year of total financial bliss for the cable industry, 1999 came as close as it gets. Not only did it have the largest mergers and acquisitions year in history, cable ops financed their way into our record books with ease and recapitalized themselves into much more lightly leveraged companies at the same time.

Bank financings totaled a record $37 bil. in 1999 with 88% or $33 bil. of the total supporting acquisitions. New equity totaled $13.0 bil., crushing all previous years and illustrating investor appetite for cable paper. New public debt also surpassed all previous years with $20.2 bil. of new debt issued before redemptions.

Not surprisingly, the busiest cable system buyers were also the most visible companies in Kagan's 1999 Cable Industry Financing Record. AT&T topped the list, completing four public bond offerings and two bank facilities totaling $34.5 bil. In addition, the company sold 100 mil. preferred shares to Microsoft raising an additional $5 bil.

Charter came in second with three public bond offerings and three separate bank facilities totaling $8.6 bil. Continuing in grand style it hit the markets in November, pricing one of the largest IPOs in history to raise $3.7 bil. to fund its acquisitions and network build-out.

Insight and Classic both made their public equity debuts in 1999, raising $648 mil. and $181 mil., respectively. MediaCom was the last of the new public equity, pricing its IPO on February 4, 2000 at $19 to raise $380 mil.

Cable may have represented just a small minority of the total IPO bucket of 544 companies raising $69.1 bil., according to Thomson Financial Securities Data, but the arrival of four new public cable companies in a matter of months marked a changing of the guard in cable.

Century, Jones, TCI, MediaOne, TCA and Media General have already left or will soon disappear off the quote screen as they are folded into the operations of new mega-operators who are blazing a broadband trail into the next century.

Cable companies have now morphed into two-way broadband behemoths, and with newfound size and scale, their ability to raise capital at more favorable rates has improved.

Operators have a diminishing amount of build-out work ahead, and they are already realizing meaningful revenues from those services they spent so lavishly to deploy. Now players on a broadband playing field that welcomes new technology competitors every day—the light at the end of the spending tunnel—may not be quite as close as forecast.

But the big difference now is that most spending will be success-based, matched by a new revenue generating subscription in each case. And the capital markets should be very willing to support accelerated spending that preserves and expands cable's market share in a fiercely competitive environment.

Cable operators were debt burdened with nearly $90 bil. total debt at December 1999 that may go up for one more year before it heads downhill. Longtime cable investors are salivating at the prospect of that day when cable ops will be looking more closely at where to spend free cash flow than at where to raise more growth capital.

The Money Market Section of *THE CABLE TV FINANCIAL DATABOOK* features an exclusive survey of cable lenders ranked by their loans out to MSOs at December 31, 1999. The section also contains a complete directory of cable industry lenders including contact names, phone numbers and loans out to assorted media sectors plus directories for underwriters and venture capitalists.

THE PRIVATE MARKET

Just when we thought cable deals couldn't get any bigger, an alliance that surprised even top executives of the companies involved took the cable industry by storm. AOL and Time Warner announced on January 10, 2000 a $50.7 bil. ($6,498/sub) deal for cable assets ($166 bil. total) that is much bigger than the sum of its parts.

It's a transaction that ushers in the new age convergence of the broadband and internet platforms for delivery of all manner of content and application offerings. Challenging the old landscape of the cable industry, it also placed at center stage one of the most pressing issues of the year, forced-access to cable pipes for competing ISPs. On this page last year, we wrote, "AOL is lobbying in Washington for access to the cable broadband plant at the same time that it is cutting deals with Bell Atlantic, SBC and other regional Bells to offer its 18 mil. customer base high-speed connectivity via DSL (digital subscriber lines)."

No one expected its next alliance would be with its perceived rival—the cable industry—and with the largest operator to boot. AOL and Time Warner now claim they will open the cable network to outsiders. But details of how that is done—financially and technically—are still to be hammered out. And, AOL and Time Warner have become the new favorite target, displacing AT&T in that role, as competitors attack the merger in hopes of winning concessions that will forward their strategic positioning.

Leading up to that huge deal, several 1999 milestones were record-makers in their own right:

- Charter completed a $3.6 bil. three-part high-yield debt offering in March—the largest in cable history and the third largest across all industries;
- Charter followed up with a $3.7 bil. IPO in November—the largest in cable history and the fourth largest ever across all industries;
- Cox paid the highest VPS we had ever recorded April 22, 1999 when it anted up $5,385/sub ($1.4 bil.) to acquire Media General's 260,000 subs;
- 23 of the top 50 MSOs exited the industry, whittling Kagan's Top 100 MSOs down to just 75; and
- Total value, average VPS and CFx for all cable transactions in 1999 soared to $76.1 bil, $3,877 and 16.2x, respectively, surpassing all other years, for the second year in a row.

For the year, 93 deals were announced/completed covering 19.6 mil. subs (29% of total subs) with an average sub per sale of 210,938. The deals increased slightly in size over 1999, but the theme remained the same: build bulk, economies of scale and continue to cluster. Operators have made huge strides with these goals in view.

Charter was, by far, the most active buyer of the year, pursuing an acquisition strategy that would provide the bulk, as well as the premier outlets to deploy its wired-world strategy. The company announced 13 deals totaling $17 bil., taking out some of the biggest names in cable, including Bresnan, Falcon, Rifkin, Intermedia and Renaissance.

It also announced a swap with AT&T that bolsters its presence in the southeast and offloads several outlying, non-strategic systems in a variety of states.

AT&T was the other big buyer of the year, announcing three acquisitions totaling $25.5 bil. After completing its acquisition of TCI in early 1999, it boldly outbid Comcast for MediaOne, paying $23 bil. in cash and a voting stock to acquire one of the crowned jewels of the cable industry.

The deal, expected to close in mid-2000 after a myriad of regulatory hurdles, will bring the company's subscriber total to 16.1 mil. and present it with another behemoth to integrate. No small task.

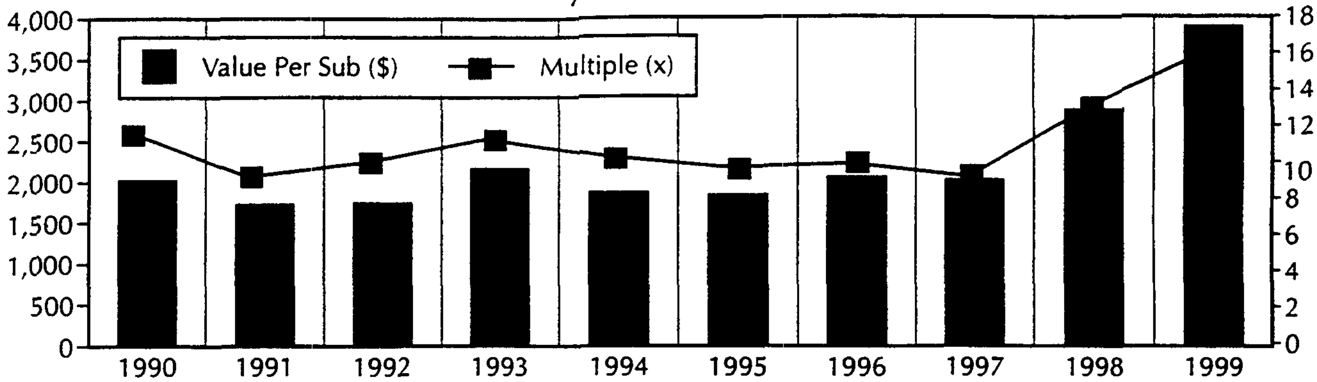
AT&T has had major challenges in bringing TCI's network up to a standard that MediaOne has already reached. The company reported a 6.1% decline in operating cash flow for its cable business year-over-year in 4Q, precipitated by the costs of clustering and upgrading TCI systems that have been hugely vulnerable to DBS competition.

With the integration of MediaOne, it expects to begin seeing synergies snowball as it improves clusters and continues to deploy its digital, high-speed access and telephony offerings. It will now have the expertise of veteran MediaOne cable executives, who've already been successfully deploying advanced services. The company has 58% of TCI's systems upgraded to at least 550MHz, with the majority at 750MHz.

The new millennium will likely bring alliances that further the roll-out of new services, rather than more huge acquisitions. We'll also see additional system swaps as operators fine-tune their newer, larger clusters into streamlined revenue machines with better economies of scale.

The Private Market section of *The Cable TV Financial Databook* lists each of 1999s transactions, sorted by state and by company. It also contains an invaluable 23-year database of cable's most prominent system sales. The Largest Cable TV Deals in History ranks, by price, all announced deals of $75 mil. or more in value. Finally, this section provides a directory of active brokers and consultants serving the industry.

Cable System Historical Value



Note: *Data includes AT&T's bid for MediaOne but does not include Comcast's bid for MediaOne.*

07-21-2000

U.S. Department Of Labor
Bureau of Labor Statistics
Washington, D.C. 20212

Consumer Price Index

All Urban Consumers - (CPI-U)

U.S. city average

Cable television

DECEMBER 1983=100

YEAR	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEP.	OCT.	NOV.	DEC.	SEMIANNUAL 1ST HALF	SEMIANNUAL 2ND HALF	AVG.	PERCENT CHANGE DEC-DEC	PERCENT CHANGE AVG-AVG
1990	148.5	151.2	153.1	152.8	155.6	159.6	161.8	163.5	162.5	161.7	163.9	166.1			158.4	13.1	10.0
1991	166.9	169.9	172.9	172.3	176.3	177.8	177.9	177.2	178.2	179.2	179.8	180.4			175.7	6.6	10.9
1992	179.0	181.7	184.6	186.5	186.5	187.8	189.6	189.2	185.9	187.3	188.8	187.0			186.2	3.7	6.0
1993	188.4	194.3	200.7	201.5	197.8	200.1	200.2	201.2	201.0	201.2	200.8	200.1			198.9	7.0	6.8
1994	200.1	200.6	200.7	200.1	200.1	199.1	196.8	195.6	193.7	193.3	194.1	194.9			197.4	-2.6	-0.8
1995	196.2	197.9	199.3	200.2	201.1	201.2	201.1	201.8	201.6	202.2	202.6	202.8			200.7	4.1	1.7
1996	204.1	206.8	207.6	209.4	210.2	211.5	214.9	215.8	216.6	217.7	218.4	218.6			212.6	7.8	5.9
1997	220.3	223.8	224.2	225.5	226.6	228.7	231.1	232.0	232.4	232.8	233.4	233.6			228.7	6.9	7.6
1998	237.9	241.7	242.0	242.7	243.7	245.3	246.5	247.5	248.5	248.1	248.7	249.8			245.2	6.9	7.2
1999	251.4	253.5	253.2	253.3	254.1	254.5	255.4	256.3	255.1	255.6	256.0	256.8			254.6	2.8	3.8
2000	260.3	263.3	264.9	264.8	265.2	266.7											

Attachment T
3rd Affidavit of Michael R. Dunn

Attachment U
3rd Affidavit of Michael R. Dunn

U

mediaCentral

Cable World

Comcast's Cash Flow Bubbles Up in 1Q

By Joshua Cho

Comcast Corp. president Brian Roberts was lamenting the loss of MediaOne Group Inc. to AT&T Corp. last week. In an analyst conference call to discuss Comcast's first quarter earnings, Roberts said, "It would be less than candid to say that we didn't want to buy MediaOne. We would have liked (to) have prevailed."

However, in the same breath he reinforced the viewpoint of many in the industry who believe the outcome was ultimately a win-win situation for all involved rather than a cold-blooded bidding war for MediaOne.

"But I must say, I think this really is a marvelous resolution that has given the company a primary objective which is to keep growing, and an outstanding phone deal. We will add over 2 million subscribers, solidly positioning us as the third largest cable operator with 8 million subscribers."

Indeed, according to some analysts, like PaineWebber's Tom Eagan, Comcast came out on top.

"It's a win-win for both AT&T and Comcast, but a great deal for Comcast," Eagan said.

The company also had a reason to gloat last week when it announced earnings that pleased the Street.

Comcast said last week that it had first quarter earnings of $73.5 million, or 12 cents per share, versus the loss of $86.0 million, or 11 cents per share, in the same period of last year. First quarter consolidated revenues were reported at $1.374 billion, up 9.5% from the $1.254 billion reported in the first quarter of last year. Consolidated operating cash flow was up 21.9% in the first quarter to $425.1 million from $348.7 million on a year-over-year basis.

Comcast's cable operations had first quarter revenues of $604.8 million, up 11.7% from the $541.2 million reported in the first quarter of last year. Operating cash flow for the cable operations was $280.5 million in the quarter, an increase of 12.5% on a year-over-year basis with operating cash flow margins at 46.4% for the quarter.

The company said it added more than 20,600 basic cable customers during the three months ended March 31, 1999, representing a twelve-month trailing subscriber growth rate of 1.3%. Comcast's digital cable offering is now available to 60% of its customers, with around 130,000 customers taking that service as of the end of the first quarter.

Cable results were driven by rate increases-which according to Comcast SVP/treasurer John Alchin were on average between 5%-6%-subscriber growth, and a "strong quarter" in advertising and PPV. Alchin also said that in April, Comcast was adding some 5,700 new digital customers per week. That's compared to the same time last year when the company had just launched its digital product and was adding just 200 customers per week to that service.

During the first quarter Comcast added more than 20,000 customers to its @Home high-speed data service, which had a total of around 72,000 customers at the quarter's-end. Penetration of that service now stands at 3.7% with availability to around 2 million homes passed. The company expects to have the service available to 4 million homes by the end of this year.

As for the company's other businesses, television retailer QVC reported revenue and operating cash flow increases of 19.3% and 38%, respectively. E! Entertainment's first quarter revenues were up 38%.

Comcast's class A special stock hit a new 52-week high of 42 9/16 the day after earnings were announced but was trading at 40 7/8, down 1 1/8 later in the week.

However, positive earnings aside, on a more sober note, Alchin said at the outset of a conference call, "the first quarter of this year won't be easily duplicated."

Alchin also warned shareholders and analysts that the company's free cash flow numbers wouldn't be sustained in coming quarters due to capital expenditures for QVC and the cable operations.

(May 17, 1999)

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Attachment V
3rd Affidavit of Michael R. Dunn

MAR 1 3 2000

MONTHLY BULLETIN
March 2000
Vol. 8, No. 1

el Video Compliance Guide

Cable's market share dips to 82 percent, FCC competition report finds

Cable's share of the multichannel video market dipped for a second straight year, while direct broadcast satellite (DBS) providers made significant gains in market share between June 1998 and June 1999, according to the FCC's 1999 *Assessment of the Status of Competition in Markets for the Delivery of Video Programming.*

Cable's share of the market declined to 82 percent of total multichannel subscribers in 1999, down from an 85 percent market share recorded the previous year.

The report indicated that there has been an increase in the total number of subscribers of noncable multichannel video programming distributors (MVPDs), which account for 12.5 percent of all MVPD subscribers. Most of this increase is attributable to the continued growth of DBS systems.

Despite the increased competition, the report said, cable rates rose faster than inflation, "although the difference between the cable price index and the Consumer Price Index (CPI) is not as great as in the previous year." Between June 1998 and June 1999, the FCC determined, cable prices rose 3.8 percent compared to a 2 percent increase in the CPI. Capital expenditures in the upgrading of cable facilities increased 13.2 percent over 1998, the FCC found, and the number of video and nonvideo services offered also increased. In addition, the commission determined that programming license fees and expenses increased. Also, the increase in labor costs in the communications industry is expected to exceed the increase in labor costs on all other industries combined by almost 2 percent, the FCC said.

Robert Sachs, president of the National Cable Television Association, said the report provides evidence that "competition has irreversibly taken hold in the multichannel marketplace" because "virtually every American household has 3 to 4 video providers to choose from, including two DBS providers, and other competitors ranging from Ameritech to SBC to RCN." He added that the Satellite Home Viewer Improvement Act "gives DBS the right to restransmit broadcast stations into local markets — the last perceived barrier to full competition" while "cable continues to expand its range of offerings — video, voice and data — to stay competitive."

(See Video Report, Page 2)

At a glance...

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VIDEO REPORT—
(Continued from Page 1)

Cable still growing

The FCC found that the cable industry continued to grow in terms of subscriber penetration, channel capacity, the number of programming services available, revenues, audience ratings and expenditures on programming. In addition, the commission said, the cable industry continues "to implement expanded broadband service offerings."

Key indicators of the growth of the cable industry included:

• the number of U.S. homes capable of receiving cable programming grew to 96.1 million;

• cable subscribership increased to 66.7 million subscribers;

• 98.6 percent of all subscribers were served by systems with capabilities of 30 channels or more and 64.2 percent of all subscribers were served by systems with capacities of 54 or more channels as of October 1999;

• nonpremium cable viewership continued to grow to a 42.2 share at the end of June 1999, while audience share steadily declined for broadcast television stations; and

• the number of basic cable networks increased to 139.

The commission also found that license fees paid by cable system operators to basic cable network programmers increased by 14.6 percent to approximately $5.5 billion in 1999. The FCC said analysts estimate that in 2000, fees will increase by an additional 10.9 percent for a total of $6.1 billion.

Cable operators are increasing their offerings to customers in certain new service areas such as digital video service, cable modems and cable telephony, the report indicated. For new cable Internet services, the commission found cable modem service is available in 32 million homes in the U.S. and Canada with more than 1 million subscribers as of July 1999. As of June 1999, the commission said, there were only 159,150 DSL subscribers, although "the rollout of DSL is accelerating" and several telephone companies have announced plans to offer DSL service to compete with cable Internet service.

Bundling services continues to increase as several cable operators are combining their video service with other services, such as local or long distance telephony, cable modem and Internet access and digital video.

Multichannel video competition (June 1999)

	Subscribers	Market share
Cable	66.7 million	82.0 percent
DBS	10.1 million	12.5 percent
HSD	1.8 million	2.2 percent
MMDS	821,000	1.0 percent
SMATV	1.5 million	1.8 percent

DBS gains

DBS subscribership grew between June 1998 and June 1999, from approximately 7.2 million subscribers to 10.1 million subscribers. "DBS appears to attract former cable subscribers and consumers not previously subscribing to an MVPD," the FCC found.

"Differences between DBS and cable continue to diminish," the report said and the differences in price between the two services have decreased as DBS equipment costs have declined.

The report indicated that some of the advantages of DBS to consumers — superior channel capacity, digital quality picture and specialized programming — "may diminish as cable operators offer digital services that allow them to match DBS operators in number of

(See Video Report, Page 3)

Multichannel Video Compliance Guide

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Commissioners opine on multichannel video competition

The following excerpts are from statements issued by the FCC commisioners on the release of the commission's 1999 *Assessment of the Status of Competition in Markets for the Delivery of Video Programming.*

FCC Commissioner William Kennard

"Americans still need more competition and choice in multichannel video. Competition is the best way to reduce cable rates for consumers.

"I am encouraged by the growth of competition to cable on a number of fronts, including wireless cable, cable overbuilders, and open video service providers, among others.

"The satellite industry currently offers the most meaningful competition to cable. I am pleased that late last year Congress gave satellite carriers the authority to offer local broadcast stations to their customers. The FCC is aggressively implementing this new legislation, well ahead of the timetables set by Congress, because it gives consumers more choice among video providers and promotes fair competition in a market that historically has been dominated by a single provider. I have long supported this change in the law and I believe it is one of the most significant developments discussed in this year's annual competition report."

Commissioner Harold Furchtgott-Roth

"I must respectfully dissent from the 1999 *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming.*

"Again, instead of examining the state of competition 'in the market for the delivery of video programming' as the statute prescribes, the report artificially limits its analysis to the delivery of 'multichannel video programming.' There are, of course, many forms of video programming that do not come bundled in channels but that are still part of the general video distribution market. Unfortunately, the report does not take full account of these very real forces in its investigation of competition. In focusing primarily on what is a submarket of video programming — the 'multichannel' distribution market — rather than the entire market, the report does not fully meet the requirements of the statute.

"The fact that a large number of MVPD subscribers opt for cable service is not in itself a reflection of a lack of competition in the market for video programming. Assuming that subscribers have choices for their source of video programming, as I think they clearly do, their selection of cable is not indicative of anything harmful. The objective here should not be to drive down cable's market share, but rather to analyze the options available to consumers."

Commissioner Gloria Tristani

"Cable is in the midst of a major transformation, from a platform for the delivery of one-way video programming to a platform for the delivery of

(See Commissioners, Page 4)

VIDEO REPORT—

(Continued from Page 2)

Access to vertically integrated programming remains a critical issue for DBS carriers, the FCC said, and they also face difficulties in fully serving suburban and rural areas. In addition, the commission determined, signal interference is another potential barrier to competition because new services that propose to operate on a shared basis in the DBS frequency band could cause interference.

However, the FCC found, "some competitive barriers appear to be diminishing, as DBS equipment costs fall and broadcast signals become available in many markets." Also, the report said, DBS providers are developing ways to bring advanced services such as high-speed Internet access to their customers.

Other MVPD competitors

Wireless cable subscriberships fell from 1 million subscribers to 821,000 subscribes between June 1998 and June 1999. However, the FCC indicated that MMDS operators may increase subscribers by offering two-way services and joint MMDS-DBS service to multi-dwelling units.

SMATV subscribership rose to 1.5 million from an estimated 940,000 subscribes. Moreover, the commission said, SMATV operators "continue to upgrade the systems to increase channel capacity and service offerings" and a number of operators have begun offering long distance and Internet services.

Local exchange carrier (LEC) entry into multichannel video is slowing, the FCC found. "Currently," the commission said, "it appears that the rate of entry may be slowing by even the most aggressive LECs and several LECs have reduced or eliminated their MVPD efforts." Moreover, the report contended, "the decline in the rate of entry ... may indicate that some LECs have already entered the geographic markets they consider most profitable, and are now only filling gaps in areas of service."

Finally, the FCC said it has certified 13 open video system (OVS) operators to offer OVS in 28 areas.

Retransmission consent rules issued for SHVIA

New retransmission consent enforcement rules were issued Jan. 28 by the commission for the Satellite Home Viewer Improvement Act of 1999 (SHVIA), which Congress passed and President Clinton signed into law Nov. 29 (see December 1999 Monthly Bulletin, page one).

SHVIA obligates satellite carriers to obtain retransmission consent from local broadcasters similar to the obligations imposed on cable operators.

Under SHVIA, before a local television broadcast signal can be delivered into a local market, the satellite carrier must obtain the consent of the local TV broadcaster to retransmit its TV signal. However, the statute allowed a six-month grace period, during which satellite carriers may retransmit local TV broadcast signals without the broadcaster's permission.

The new rules for retransmission complaints between satellite providers and broadcasters include requirements for filing company and dispute data as well as the obligations by satellite carriers to provide responses to any retransmission consent complaints. Under the rules, the FCC must issue, if necessary, a cease-and-desist order within 45 days to a satellite provider violating SHVIA's retransmission rules.

However, the commission's rules place "the burden of proof on the TV station to establish that the satellite carrier retransmitted the broadcaster's TV signal without consent. DBS providers have five days to respond to a complaint.

The enforcement procedural rules will take effect on May 29, 2000, when the grace period expires and retransmission consent is required. As directed in the statute, these enforcement procedures will sunset after Dec. 31, 2001. ▶

COMMISSIONERS—

(Continued from Page 3)

a bundle of products, including advanced and two-way services. For many of these services, the cable industry has been driving residential deployment and has begun offering consumers the kind of competitive choice envisioned by the Telecommunications Act of 1996. Cable deserves a great deal of credit for its efforts.

"But this report is not about cable's entry into new markets like Internet access or telephony. Under the Communications Act, this report is about competition in the market for the delivery of video services. Millions of Americans still rely on plain old one-way video service for their news, information and entertainment. These consumers should not be forgotten in our rush to continue sharpening the cutting edge.

"Two things stand out in this year's report:

"First, it appears that widespread video competition, if it comes, will come via satellite and not from terrestrial competition. In particular, incumbent local exchange carriers, which once clamored for the right to offer video (and, indeed, took the issue all the way to the Supreme Court), continue to show limited interest in large-scale entry. Indeed, it appears that Ameritech (now SBC) — always the 'poster child' for LEC video entry — may be dropping out of the cable business altogether. DBS, by contrast, continues to add subscribers, and, with local broadcast signals now available in many communities, may be on the verge of finally becoming a true alternative to cable for many consumers. We must continue to do whatever we can, within the confines of the law, to strengthen DBS's ability to compete.

"Second, the number of distinct programming voices that the public receives is distressingly small. The Report finds that 46 of the top 50 cable networks are owned by 12 large media conglomerates — ABC/Disney, General Electric, CBS, News Corp, Time Warner, Viacom, Discovery, Rainbow Media, Liberty Media, USA Networks, E.W. Scripps and Comcast. And two of the remaining four services are C-Span and C-Span2, which are funded almost exclusively by the cable industry. More disturbing, these same entities also control the top commercial television broadcast networks, dozens of television stations and lesser cable networks, many of the major movie, TV and video production studios, and even the country's largest video rental distributor. Thus, to a significant extent, the video programming that the American public receives is being funneled through a handful of media gatekeepers (not to mention the vast magazine, newspaper, publishing and Internet properties owned by these entities).

"These potential bottlenecks should be a concern of all those who care about true competition and the clashing of opinion that is so vital to our democracy. How information is presented and what stories are covered on television — and, often more important, what stories are not covered — has a significant impact on public perceptions and the discussion of public issues. More channels do not necessarily mean that additional views are being expressed. More channels often just mean that the same voices can express their views over and over again." ▶

Kennard outlines FCC's 2000 regulatory agenda

Claiming "the rules of the road are virtually complete, we have prevailed in the courts, and our authority is settled," FCC Commissioner William Kennard outlined in a press conference Jan. 19 how the commission will continue to implement the 1996 Telecommunications Act in 2000.

Looking at the past year, Kennard highlighted the "ABCs of my chairmanship: access, broadband and competition." In terms of access, he said the federal E-Rate program "is bringing its second successful year to a close, and now provides connectivity for one million public school classrooms." Kennard also mentioned the commission's efforts to increase telecommunications access for "the 54 million Americans with disabilities."

In terms of promoting broadband, Kennard said, "The American people want high-speed access to high-quality programming, and broadband to every home is critical to that vision." He claimed that the commission "wisely withheld regulation of most advanced services, while making sure that certain features, such as the ability of one company to deliver broadband to the home over the same line another company is using to provide basic telephone service, are available to all competitors and incumbents alike."

Telecommunications competition became further realized in the past year, Kennard said. "Local exchange markets are opening to competition, signaled first by Bell Atlantic's demonstration, in its application to provide long distance service in New York, that its New York market is open to competition," he said.

In addition, Kennard claimed that "video competition is still getting underway, but ... progress is being made."

'Aggressive implementation'

"Our aggressive implementation of the [1996] act is generating new classes of competitors, new industries and lower prices," Kennard contended. For example, he cited the emergence of competitive local exchange carriers (CLECs) and new DLECs (competitive local data carriers), "as well as whole industries of equipment and applications that have suddenly become active players in servicing consumers."

He hailed the FCC's deployment of "spectrum for thousands of licenses for new and innovative services, such as PCS, LMDS, and DARS" as indicative of the agency's pro-competitive policies. Consumers also have benefited from falling prices, he said, claiming that "since 1994, wireless prices have dropped 40 percent, and wireless subscribership has quadrupled."

Kennard also said, "long distance rates have dropped nearly 56 percent in real terms since divestiture in 1984," and "in the last two years alone, we have reduced access charges by $3.1 billion, resulting in the five-cents-a-minute offerings available to every American this very day."

Agenda 2000

Outlining his 2000 agenda, Kennard said the FCC will promote telecommunications access by initiating action on low-power FM and broadcast EEO rules, "both of which increase the access of Americans to the airwaves or to the industry" (see related story, page 6).

"During the year," Kennard said, "we will address additional access by Americans with disabilities, access for underserved areas, and access by the public through the broadcast public interest obligations. We also will be working through the Development Initiative to increase the access to international networks by underserved nations."

The FCC will also be examining closely the broadcast industry's progress in making digital televisions compatible with cable. He said the agency will be "taking steps to bring high-speed broadband service to rural areas, and to expand the opportunities for entrepreneurs to build wireless webs."

Evaluating a number of mergers affecting telecommunications competition are high on the commission's 2000 agenda, Kennard said, including: US West/Qwest, Bell Atlantic/GTE, Sprint/Worldcom, CBS/Viacom and AT&T/Media One. He said the agency also intends to review a long distance application from SBC and "we anticipate receiving an application from Bell South, to provide long distance service.

Kennard said the FCC will be implementing "the Strategic Plan we presented to Congress last October," which proposed organizing the commission along functional lines. Already, he asserted, the agency has "launched the Enforcement Bureau and the Consumer Information Bureau" and is working on "a possible Licensing Bureau." Specific commission issues such as electronic filing, merger review, the biennial review, underserved populations and spectrum efficiency also will be addressed, Kennard said. ▶

E-mail us with

questions at

tube@thompson.com

Revised Equal Employment Opportunity rules adopted

Revised cable employment rules that clarify how cable operators and networks should promote federal equal employment policies were issued Jan. 20 by the FCC.

The Equal Employment Opportunity (EEO) rules prohibit discrimination on the basis of race, religion, color, national origin or gender. The FCC broadcast and cable EEO rules respond to the D.C. Circuit Court of Appeals decision in 1998 in *Lutheran Church Missouri Synod v. FCC,* which held that certain aspects of the commission's previous broadcast EEO outreach requirements were unconstitutional.

The FCC modified its cable EEO rules to remove all requirements that cable entities compare their employment profile and employee turnover with the local labor force, even as a screening device. "We believe that these modifications will ensure that cable entities are not pressured or encouraged to adopt racial or other preferences in hiring," the agency said.

Consistent with these modifications, the FCC also revised the annual employment reports (Forms 395-A and 395-M) and Supplemental Investigation Sheets (SIS or SIS form) filed by cable operators.

Recruitment

Regarding recruitment, the commission said, "we believe that broad and inclusive recruitment by cable entities is essential to deter discrimination and foster diversity of programming," adding that "our objective of ensuring that minority and female applicants have the opportunity to apply for positions in the cable industry, underlying the recruitment requirement ... can be achieved without requiring recruitment methods that are specifically targeted to those groups."

To this end, the agency adopted a recruitment rule for cable entities similar to that adopted for broadcasters that affords cable entities flexibility "to design outreach programs that best suit their individual circumstances and needs." Recognizing that some modifications to existing EEO rules were needed, the FCC adopted for cable entities a modified version of the broadcast recruitment rule.

In addition, the FCC revised the cable EEO rules, as well as the annual employment reports and SIS forms filed by cable operators, to make it clear that cable entities are not required to target any particular recruitment sources. "Cable entities are given wide discretion in designing their outreach programs provided they reach a broad cross-section of the community, including minorities and women, with information concerning job vacancies," the commission said.

The new cable EEO recruitment rule for cable entities will apply to all full-time positions, both upper-level and lower-level. The FCC will apply the same policies on promotions, temporary employees, interns, part-time employees and former employees to cable entities as are applied to broadcasters. "Thus," the agency ordered, "we will not ordinarily require cable entities to recruit for internal promotions, temporary employees and interns. However, temporary employees and interns will be subject to recruitment requirements if they are later considered for permanent positions."

With respect to part-time positions, the commission included a provision clarifying that, in the case of part-time hires, cable entities need "only substantially comply with the requirement to recruit for every vacancy." For example, the agency said, cable entities choosing that approach will not be required to provide notification to requesting organizations for part-time vacancies.

Recordkeeping

Cable entities are required under the new EEO rules to retain certain records so they can meaningfully self-assess the effectiveness of their EEO programs and to prove that they have made good faith efforts to broaden their applicant pools for all vacancies. "Our purpose in establishing any recordkeeping requirement for cable entities is primarily to ensure that cable entities engage in meaningful outreach and to provide a basis upon which they and the commission can analyze their recruitment efforts," the FCC said, adding that "this goal can be achieved in many cases, without the necessity of maintaining applicant pool data."

Under the new recordkeeping rules, cable entities will be required "to retain in their own records documentation necessary to verify that recruitment occurred for each vacancy, including a list of the vacancies filled during the pertinent review period, the recruitment sources contacted for each vacancy and other recruitment efforts undertaken."

In addition, the agency ordered, records must be maintained of the recruitment source of hirees and interviewees (in the case of those cable entities that elect to utilize supplemental recruitment measures) or maintain applicant pool data (in the case of cable entities that choose the alternative recruitment program). "We will expect cable entities to use these records as a starting point in analyzing the success of their recruitment efforts in achieving broad outreach to all segments of the community and, in the event of problems in that respect, to make modifications in

(See EEO Rules, Page 7)

(Continued from Page 6)
their recruitment efforts, as warranted," the commission said. Thus, the rules require a cable operator to analyze the effectiveness of its outreach program, and address any problems found.

Recruitment records must be maintained for a minimum of seven years, the FCC said, and may be maintained electronically. However, the commission cautioned, "absent a showing of extraordinary circumstances, we will not credit claimed recruitment efforts that cannot be supported by records."

Public file

Local community residents are given a role in monitoring cable entities' compliance with FCC outreach requirements under the new EEO rules.

Each cable operator must place in its public file annually and post on its Web site, if it has one, on the anniversary of the date that the cable operator's annual employment report is due to be filed the following information:

• a list of all full-time vacancies filled by the cable operator during the preceding year, identified by job title;

• for each vacancy, the recruitment source(s) utilized to fill the specific vacancy (including, in the case of cable entities utilizing the supplemental recruitment measures, organizations entitled to notification of vacancies, which should be separately identified), including the address, contact person, and telephone number of each source; and

• a statement as to the cable operator's initial election between the two approaches (supplemental recruitment measures or alternative recruitment program) designed to ensure broad recruitment outreach and changes resulting from a substantial change of ownership (other changes in the operator's election will be in its annual employment reports, which already must be included in the public file).

In addition, cable operators that elect to utilize the supplemental recruitment measures will be required to include in their public file:

• a list of the recruitment source that referred the hiree for each full-time vacancy;

• data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source utilized in connection with any such vacancies, the total number of interviewees referred by that source; and

• a list and brief description of the menu options engaged in during the preceding year.

Relief

Cable operators with fewer than six full-time employees will not have to demonstrate compliance with the EEO program requirements because "small staff cable operators have limited financial/administrative resources."

However, all cable entities — including those with fewer than six full-time employees — are subject to the provision of the EEO rules that prohibits discrimination. Further, all cable operators must continue to maintain an EEO program even if some recordkeeping requirements are relaxed for smaller operators. Also, the new rules mandate employees to be full-time if their regular work schedule is 30 hours per week or more.

Finally, the FCC included in the new rules language clarifying that "the provisions in those rules are not intended to require that any person be given preferential treatment based on race, color, national origin, religion, age, or gender."

Enforcement

Cable operators with six or more full-time employees will be required to file annual employment reports with the commission and provide recruitment-related information featured in the Forms 395-A or 395-M. This information, except the particular employment profile of the cable operator, will be used to determine annually whether operators are in compliance with the EEO rules. "We emphasize, however, that statistics provided about race, ethnicity, and gender of employees will not be used to determine compliance with EEO rules but will only be used to monitor industry trends and report to Congress," the FCC said.

Systems found to be in compliance will receive a Certificate of Compliance; systems found not to be in compliance will receive notice that they are not certified for a given year.

A cable operator may be found to have committed a "substantial failure to comply" with the requirements of federal EEO rules if a cable operator is found to have three or more failures in compliance in a seven-year period. Thus, operators will be required to retain for a minimum of seven years any records necessary to document their recruitment efforts.

In addition, to ensure compliance, the FCC may at random conduct an inquiry of a cable operator by requesting information relating to the operator's compliance with the EEO rules and may also conduct an inquiry if the commission has evidence of a possible violation of the EEO rules.

In addition to annual certifications, the commission will investigate each cable and MVPD cable operator at least once every five years. Operators will be required to submit supplemental investigation information, as requested in the SIS form, with

(See EEO Rules, Page 8)

Senate examines controversial rural loan program

A controversial provision of the recently enacted Satellite Home Viewer Improvement Act (SHVIA), mandating loan guarantees for DBS providers to carry local broadcast channels to rural markets, was examined by Senate lawmakers.

SHVIA obligates satellite carriers to obtain retransmission consent from local broadcasters similar to the obligations imposed on cable operators and offer the signals of those broadcasters to local markets. However, lawmakers were concerned that certain rural markets would not be served with the local signals and inserted in SHVIA a federal loan program that would aid multichannel providers in extending local signals to those markets.

In a Feb. 1 hearing before the Senate Committee on Banking, Housing and Urban Affairs, cable, satellite and government regulators testified on the best way to implement SHVIA's federal loan guarantee provision.

Sen. Phil Gramm, R-Texas, chairman of the committee, and critic of the SHVIA provision because it offered the loan guarantees to DBS providers at the exclusion of rural cable operators, said Senate lawmakers "will try to write a loan guarantee program that maximizes the probability that the loans will be paid back, and the taxpayer will not be left holding the bag. I think we can achieve both objectives at the same time." Gramm added that he expects the bill to be introduced by the March 30 deadline imposed by SHVIA.

Cable operator Richard Sjoberg, president of Sjoberg's Incorporated Cable Systems, testified before the committee that rural cable operators "are concerned ... about proposals that might provide government subsidies to some industries — but not others — in an otherwise competitive video marketplace." He contended that "some of the proposals for expanding local-into-local service compound our competitors' advantages by having the federal government subsidize DBS's capacity to provide local broadcast signals — even though these competitors are owned by companies with market capitalizations of $21 billion (EchoStar) and $16 billion (GM/Hughes) and have annual revenues of $1 billion to $6 billion."

Sjoberg commented that "the fear of many small cable operators is that any rural loan guarantee program will be interpreted as a congressional mandate to build another satellite — at discounted, federally insured rates — to carry local broadcast signals into markets which local businesses could serve more cost-effectively through other technologies."

He suggested that a federal loan guarantee program should be:

- "technology neutral;
- narrowly focused on unserved or the most underserved markets; and
- set up in a manner that minimizes the paperwork burden on applicants."

Sjoberg claimed that "small cable businesses and others could use loan guarantees to extend their facilities to areas that are not currently economical to serve — typically areas with fewer than 10 to 12 homes per mile" and "they could also use other technologies, such as translators, microwave links, repeaters, relay stations, and new wireless systems, to improve access to broadcast signals." He added, "The need for such technology neutrality is especially important since companies like mine are providing rural consumers with broadband services and high speed access to the Internet, thus helping to bridge the digital divide."

Greg Rohde, assistant secretary for communications and information, U.S. Commerce Department, testified that any new program should be technology neutral in recognition of the fact that different technologies may best be suited to deliver local broadcasting services to unserved areas in different parts of the country. He added that a rural loan guarantee program "should be crafted to ensure that it promotes competition in the multichannel video programming market and encourages future private investment in infrastructure."

EEO RULES—

(Continued from Page 7)

their regular 395-A or 395-M reports in the years they are investigated.

Finally, cable entities found to be in violation of the EEO rules "may be subject to sanctions and remedies including noncertification, admonishment, reporting conditions, and forfeitures," the FCC said.

Forms

The new EEO rules require cable systems with six or more full-time employees to file an employment report (Form 395-A) annually, which calls for responses to questions about the operator's EEO efforts as well as employment, hiring, and promotion data.

However, these employee statistics will not be used to assess EEO compliance but will be used solely for the preparation of trend reports and to report to Congress. Furthermore, the FCC will continue to require cable entities to keep copies of Form 395-A and 395-M available for public inspection. Also, the new cable EEO rules eliminated or revised certain questions on Forms 395-A and 395-M. New forms can be accessed at the FCC's Web site at **http//www.fcc.gov.**

San Francisco proposes open access policy options

The city of San Francisco has developed an open access plan that it is prepared to implement if local lawmakers are inclined to do so.

In July 1999, the San Francisco Board of Supervisors passed a resolution supporting a policy of open access. While the board did not require open access as a condition of the cable franchise transfer from TCI to AT&T, it directed the San Francisco Department of Telecommunications and Information Services (DTIS) to develop a plan for implementing the open access policy in the future.

The DTIS issued its report Jan. 14 to the board of supervisors and it provides municipalities with valuable insights to the various open access policy options before them.

Dismissing cable industry claims that open access is technically impossible, the DTIS report said, "consensus is emerging ... that open access is technically feasible. Every local jurisdiction that has examined this issue has come to this conclusion." On the impact of an open access policy on cable investment in high-speed services, the DTIS found that "although the cable industry has used theoretical arguments to insist that multiple providers would destroy incentives to invest, a fact based assessment of revenues and costs reveals that cable operators will have overwhelming incentives to invest."

Three regulatory options

DTIS presented three policy options to the board of supervisors:

Option 1: Monitor for possible future implementation. This option provides that no action be taken at this time. Instead, DTIS said, the city would monitor the broadband marketplace "so that if a problem emerges, action could be taken to promote consumer choice."

This option would require cable operators to submit data annually in June of each year and would allow San Francisco to take subsequent action. The objective of this option "is to encourage cable operators to open their networks to competition while refraining from intervention unless market power develops," DTIS said.

DTIS said board members should choose this option if:

• they are uncertain that cable operators will gain market power over transport or use this market power to gain control over adjacent markets such as content and applications;

• they believe that service providers will open networks without intervention;

• they believe that intervention at the local level may not be effective; and/or

• they believe that the costs associated with imposing a requirement outweigh any potential consumer benefit from increased competition.

The advantages of this approach, DTIS said, include avoiding the imposition of restrictions until after market power develops as well as allowing "cable operators the greatest flexibility as they build/rebuild networks and roll out service."

However, disadvantages of this approach the report highlighted are that "it may subject consumers to abuses of market power by cable companies and market power may be more difficult to dislodge once it has been established than to prevent before it develops." DTIS also said this approach "may slow innovation in broadband ISP services by limiting the number of ISPs seeking solutions to the problems of creating a rich user experience that takes advantage of broadband services and forcing unaffiliated ISPs to focus on other technologies, probably DSL."

This approach would require cable operators to report on the following information on an annual basis such as deployment, penetration, voluntary agreements with unaffiliated ISPs and the operator's current acceptable use policy.

Under this policy, beginning in November 2000 and annually thereafter, the report said, the DTIS director would make a recommendation to the Telecommunications Commission and the board whether to impose an open access requirement. The recommendation would be to either impose an open access requirement, continue monitoring without a requirement, or abandon monitoring.

Option 2: Require open, nondiscriminatory access to broadband transport by Jan. 1, 2003. The second option is to impose a requirement for nondiscriminatory access to broadband transport now with implementation by Jan. 1, 2003. DTIS said this delay in implementation "would allow cable operators and ISPs to work out the details of implementing an open access requirement before making it effective."

Decisionmakers should adopt this approach, DTIS said, "if they are concerned about market power by cable operators in the transport market, but do not want to delay consumers access to this new technology until after the operational details of implementing open access are resolved." The agency said this option allows San Francisco to lift the requirement "if the concerns over market power do not materialize."

The advantages of this approach, DTIS claimed, are that it:

• "[e]stablishes a clear goal of open access;

• avoids delay in initial deployment of high speed Internet access over cable infrastructure;

(See Open Access, Page 10)

OPEN ACCESS—

(Continued from Page 9)

• allows time for industry to develop technical and business arrangements;

• reduces cost for the cable operator and ultimately the consumer by allowing the cable operator to deploy high speed Internet access;

• coincides with the period in which high speed Internet access over cable will be available to a large portion of San Francisco consumers;

• existing exclusive contracts of some of the providers and affiliated ISPs will have expired, e.g., AT&T/Excite@Home agreement;

• allows recovery of investments made in equipment in anticipation of deploying a closed system; and

• allows jurisdictional issues to be resolved prior to imposing the requirement."

The disadvantages of this approach, DTIS said, are that "it allows a cable operator's affiliated ISPs to get a head start on potential competitors and cable operators may procrastinate in developing technical and business arrangements for open access until the deadline is near."

DTIS recommended that this option should also include a provision for the board to annually review the status of the broadband market and eliminate this requirement if certain conditions exist.

Option Three: Require open, nondiscriminatory access to broadband transport now. The third option is to require cable operators to provide open, nondiscriminatory access now. DTIS said, "Decisionmakers should support this option if they believe that cable operators will have significant market power over transport and have the opportunity and incentive to use this market power to influence other allied content and services markets."

Advantages of this approach, DTIS said, include, "forcing cable operators to immediately begin working on open access" and preventing "market power in the transport field from impacting the content and service markets."

However, the agency also identified disadvantages of this approach, including:

• "[i]t may limit consumer choice of broadband services in the near term by delaying deployment of cable modem service in San Francisco, especially if the cable operator is prevented from offering cable modem service until it does so in an open, nondiscriminatory manner since the operational details will take several months to implement;

• cable modem services are not yet offered in San Francisco;

• jurisdictional and other legal issues have not been resolved;

• operational issues have not been resolved; and

• it may be unnecessary because cable operators will have limited market power and/or will not have the motive or opportunity to leverage this market power into allied content and service markets."

An open access requirement should require a cable operator to provide any requesting ISP access to its broadband transport services (unbundled from content) on rates, terms and conditions that are at least as favorable as those on which it provides such access to itself, its affiliates or any other person, DTIS contended. Moreover, the agency reasoned, "This access should be provided at the point where the operator provides access to itself, its affiliates or any other entity or at any reasonable, technically feasible point requested by and ISP."

Under this option, DTIS said broadband access transport services should be defined as the transmission of data between a user and his or her ISP's point of interconnection. Also, the agency claimed that the requirement could be enforced by creating a private right of action for an ISP that has been denied nondiscriminatory access or by the city.

DTIS recommendations

DTIS recommended that San Francisco impose immediately these principles on cable ISPs to promote open, nondiscriminatory access to information:

• access to information without seeing proprietary content, i.e., a single click requirement;

• access to all content and services;

• equal treatment of all Internet traffic; and

• access for people with disabilities.

The agency also stipulated that the city "consider extending this policy to other broadband service providers and other ISPs through its purchasing power, to the extent legally possible."

In addition, DTIS recommended that the board adopt "a requirement for open, nondiscriminatory access to broadband transport now with implementation by Jan. 1, 2003." The agency said this approach "will allow the courts to resolve jurisdictional issues, the industry to resolve operational issues, and San Francisco consumers to realize the benefits of immediate deployment of cable modem service."

A mechanism was also recommended to the board to eliminate the access requirement if it can be demonstrated in concrete terms that market conditions no longer require open access.

Finally, DTIS suggested that San Francisco implement its open access policy "in the broadest manner legally available, as the policy is not intended to apply to a single carrier" and that "to accomplish this goal, the city may want to consider adopting an ordinance. ▶

Attachment W
3rd Affidavit of Michael R. Dunn

W

The last mile access race is heating up

By TIM GREENE AND DENISE PAPPALARDO
Network World, 04/24/00

The Internet of the future is based on everybody having blazingly fast access. So how do we get that broadband speed over the crucial last mile?

Three technologies - cable modems, digital subscriber line (DSL) and fixed wireless - are contending to supply much of this bandwidth. But none of them has yet emerged as the clear winner.

Handicappers say the two hottest prospects for last-mile technology are cable modems and DSL. Both use networks already in place and that, for all practical purposes, reach nearly all remote business sites and telecommuters between them.

Lagging behind is fixed wireless, still waiting for service providers to build the infrastructure they need to deliver services widely.

While all three access methods can supply multimegabit speeds, none is perfect:

- Cable modems provide up to 10M bit/sec over a shared network. So if you are on a heavily used loop, your bandwidth plummets. Cable modem access costs about $40 per month.
- DSL runs over regular phone lines but has distance limitations and is sensitive to copper wire quality. DSL access costs $40

copper wire quality. DSL access costs $40 to hundreds of dollars per month, depending on bandwidth and service-level guarantees.

- Fixed wireless offers speeds up to 155M bit/sec, but weather can be an obstacle and there must be an unobstructed line of sight between broadcast antennas and customer sites. Some 384K bit/sec services cost about $150, and some providers claim to undercut local wired access by 30%.

Customers can weigh the options and pick their favorite, but chances are they won't have a real choice. Places where DSL, cable and wireless providers compete are still the exception.

"Service providers now are just trying to get customers, not take customers away from each other," says Jamie Mendelson, an analyst with The Strategis Group in Washington, D.C.

If you consider the number of potential broadband customers, service providers have barely scratched the surface. Total sales of cable modem and DSL services at the end of 1999 were less than two million lines - barely a statistical blip in a country with 146 million business and residential phones, according to Insight Research.

Based on that small sampling, cable modems hold a clear lead over DSL and wireless, but DSL looks ready to come on strong. Cable providers have 1.1 million modem customers, according to estimates by The Yankee Group. The same study says 300,000 DSL lines are in service, but other industry estimates are closer to 600,000. IDC, a market research firm in Framingham, Mass., expects DSL to surpass cable modems in 2003, while Cahners-Instat Group says that will happen in 2002.

Wireless is in distant third with more than 40,000 links in 1999 based on service provider reports. That figure outstrips the IDC estimate of just 30,000 links for last year.

While providers have made a modest start, competition seems about to heat up, as services become more widely available. DSL customers will soar to 13.9 million by the end of 2002, Cahners-Instat says. Leaders are the regional Bell operating companies - owners of the phone lines - with more than half the current customers, The Strategis Group says.

Cable modem users will jump from about 1.5

This Week

You
Our annual look at your job, life and free time. Featuring our salary survey and calculator.

New modem standard boosts dial-up access options

Women, minorities could fill more high-tech jobs

Software manages Web content

Genuity bolsters service guarantees

More news, reviews and features from Network World

Test Pilots

User reviews
HP Jornada 690 beats the Palm; Gyromouse rules in presentations; more.

[redacted]

million in 1999 to 8.3 million in 2003, Cahners-Instat says. Excite@Home and RoadRunner are the runaway market leaders with 97% of existing customers between them.

Fixed wireless hasn't gotten as far yet, but it is growing rapidly. Users are expected to spend $828 million this year on fixed wireless, nearly triple what they spent on the technology last year, IDC says. The big names are Teligent and WinStar, with Nextlink, Sprint and MCIWorldCom waiting in the wings with fistfuls of wireless licenses.

While this level of growth sounds impressive, some experts say wireless cannot keep up in the long run. "That is absolutely, positively not going to happen," says Tom Nolle, president of CIMI, a technology assessment firm in Voorhees, N.J.

Still, wireless will have its place, bypassing local terrestrial access to long-distance networks at T-1 speeds or slower for less than the price of a T-1, says Jim Lawrence, program director at Stratecast Partners in Mountain View, Calif.

Big investment

In an attempt to broaden availability of their offerings, service providers are digging deep into their pockets to fund their networks.

The top seven cable carriers invested between $9 billion and $11 billion last year to upgrade their networks, according to The Strategis Group. That is on top of about $6 billion they spent in 1998. Some of that investment will bring cable networks' fiber backbones directly to business customers. Direct fiber represents yet another broadband access technology, but it is much less widely deployed.

"Cable doesn't go to most businesses today, but I expect AT&T to change all that," says Robert Larribeau, an analyst with consultancy RHK.

In the DSL arena, jumbo Bell company SBC Communications is pouring in $6 billion to upgrade its network so DSL can reach 80% of its customers by 2002.

Major competitive local exchange carriers focused on DSL, such as Covad Communications, NorthPoint and Rhythms NetConnections, are also investing huge sums. It costs competitive carriers up to $250,000 or more just to get space for their DSL gear in RBOC switching offices.

[redacted]

[redacted]

Wireless carriers, for their part, have spent billions of dollars to acquire Federal Communications Commission licenses to use the airwaves.

These efforts have borne fruit for some customers who happen to live in areas where cable modem and DSL services overlap. Advertising wars have broken out over this.

For example, Pacific Bell sells DSL in areas of California where a variety of companies offer cable modem services. PacBell runs TV advertisements depicting suburban anarchy that stems from too many people vying for limited bandwidth on cable networks. The ads portray neighbors, desperate to keep their access fast, cutting cable lines to other homes, spray painting "Cable hog" on houses and shunning newcomers as they move in because they represent another drain on limited bandwidth.

Such images make for good TV, but they don't reflect what is really happening, says Ray Keneipp, an analyst with the Burton Group. "I don't think technologies compete with each other. Companies that employ these technologies compete with each other."

From the evidence, he is right. Service providers are mixing and matching their offers to reach as many customers as possible. They don't seem to care which of their services the customers buy, as long as they are buying broadband access.

AT&T, for example, has staked its local access future on cable modems, spending more than $100 billion to buy and upgrade cable networks. But the carrier also spent $11 billion on TCG, a local fiber network in cities nationwide.

In addition, AT&T says it will fill in with DSL and wireless in areas its cable networks miss.

Similarly, Excite@Home, the largest provider of cable modem service, says it will supplement its access network with DSL it wholesales from Rhythms.

Nextlink, a service provider that owns most of the licenses for wireless local multipoint distribution services, says it will sell DSL services to connect customers to its network.

Ultimately, it won't matter to customers what the access method is so long as it's fast, says Nick Stanley, an analyst with Communications Industry Research in Charlottesville, Va. "The fact that it's

[redacted]

coming in on a dish from the rooftop or from a cable, they are not going to care," Stanley says.

But other analysts distinguish between the technologies. DSL is better suited to business uses than cable or wireless, says Brad Baldwin, an analyst with IDC.

"The Achilles' heel of cable is it's a shared network," he says. To mask that, some carriers are downgrading speeds to just 300K bit/sec, regardless of whether additional bandwidth is available. That way when more customers sign up and contend for bandwidth, existing customers won't see their service degrade, he says.

DSL, on the other hand, gives customers their own link back to the carrier's network. If the customers are willing to pay for it, they can get guaranteed bandwidth from end to end, Baldwin says.

Wireless, while pricey compared to cable and DSL (it costs $150 for a modest 384K bit/sec connection) can fill the gap when other technologies aren't available, RHK's Larribeau says.

For now, customers seeking fast access to the Internet will take what they can get and afford. But that is all about to change, CIMI's Nolle says.

Cable modems, DSL and wireless can all offer T-1 speeds at less than the cost of T-1 lines, breaking the access choke point of 56K bit/sec set by the fastest dial-up modems.

That leaves open a world of possibilities such as voice and data traveling over the same access line, access to entertainment on that same circuit and the ability to easily switch from one ISP to another.

Next week: Technology advances on the horizon for broadband access.

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MONTHLY BULLETIN
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Multichannel Video Compliance Guide

FCC's new cable ownership rules benefit larger companies

Seeking to reflect a "converging marketplace and increasing competition in video programming," the FCC on Oct. 8 revised its cable ownership and attribution rules to reflect the agency's "desire to permit larger cable companies to realize the efficiencies of common ownership" and "meet the challenge of limiting large cable companies' control over the video market, while giving these companies the flexibility to expand into new markets like local telephone and broadband services."

The rules will have a significant impact on the cable marketplace because they will enable AT&T to complete its acquisition of MediaOne without having to make major divestitures of cable systems.

Ownership cap raised

Under the new ownership rules, the 30 percent horizontal ownership cap on the number of total subscribers an MSO can own will remain the same. The old rules calculated this horizontal ownership cap based on the total number of nationwide cable homes passed.

Under the FCC's new rules, instead of counting only cable subscribers as part of the ownership cap, the commission will include the nationwide subscribers of all multichannel video programming distributor (MVPD) subscribers — cable, DBS and other MVPDs — to calculate the 30 percent ownership cap. The agency said this ownership limit is effectively equal to 36.7 percent of current cable subscribers.

FCC Chairman William Kennard said the new rules "do a great job of refining our 1992 vintage rules to take account of the changes brought on by the 1996 act," adding that "the refined rules also take into account one other change in the last few years — DBS." He contended that while "DBS is not the force that cable is ... it's making a dent, and our refined rules take account of that by measuring a cable operator's market strength in the context of the overall multichannel video industry and not just vis-a-vis other cable operators."

The fate of the cable ownership rules ultimately could be decided in court. Time Warner has challenged the 30 percent rule as unconstitutional in the U.S. District Court for the District of Columbia, which will hear oral arguments in the case this December.

Attribution changes

The FCC also altered its cable ownership attribution rules, which regulate those corporate, financial, partnership, ownership and other

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OWNERSHIP RULES—

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business relationships that confer on holders a degree of ownership, influence or control over a MVPD.

The new rules retained the 5 percent or more active voting stock benchmark, but raised the passive institutional investor voting stock benchmark from 10 percent to 20 percent.

Also, the FCC will permit interest holders in limited liability companies "to insulate their interests from attribution by using the insulated limited partner criteria." The FCC modified this exemption, ruling that a limited partnership is attributable if the partner is involved specifically in only the "video programming activities" of the cable company. The previous provision mandated that a limited partnership was considered attributable if the partner was involved in the "media activities" of the cable company — a rule that the agency considered too broad. Under the new rules, a limited partner is "insulated" from being counted as an attributable interest if the partnership certifies that the partner "is not materially involved, directly or indirectly, in the management or operation of the 'video-programming' of the partnership."

A new "equity/debt" rule was instituted by the commission in addition to the current attribution rules. Under the new ownership rules, when an investor holds over 33 percent of the total assets (debt plus equity, voting or non-voting stock) of an entity, that investor will be deemed to have an attributable interest in a MVPD.

New definitions were adopted for the term "affiliate," which, the FCC said, are also applicable to federal effective competition and the cable-telco buyout prohibition. An entity is an affiliate of a local exchange carrier (LEC) if the LEC holds 10 percent or more of the voting equity of the MVPD. For the purpose of the cable-telco buyout prohibition rules, the commission ruled that an entity is an affiliate if it has a 5 percent voting interest. "The LEC test is not designed to identify for potential influence," the FCC said, "but it is designed to determine whether there is significant LEC involvement in an affiliate such that the affiliate benefits from the LEC's financial and technical resources."

In addition, a "Directors and Officers Attribution" rule was created by the commission in which directors or officers shall be considered attributable unless they are not involved in the video activities of either "the appointing entity or the cable systems at issue."

NCTA reaction

"The commission's decision recognizes that the communications marketplace is much different today than when the previous cable ownership rules were adopted in 1993," said National Cable Television Association President and CEO Robert Sachs, adding that "cable operators face increased competition from a variety of providers."

However, Sachs contended, in light of the FCC's recent approval of the SBC-Ameritech merger, "who together will control one-third of local telephone lines in the U.S. ... the continuation of the 30 percent cable ownership cap does not seem justified."

Two FCC commissioners partially dissented from the rules. Commissioner Harold Furchtgott-Roth contended that the attribution rules should have been simplified, "instead of creating additional layers of regulation such as the equity-debt-plus test." He also wanted the 30 percent ownership cap to be raised higher.

Commissioner Gloria Tristani criticized the commission's attribution standard for officers and directors, which, she said, should be expanded to "whenever these individuals' duties relate to the media activities" of a company. ▶

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Consumer groups issue study advocating open access

Open access to the high-speed broadband Internet is essential "to preserve the Internet as a vibrant medium for communications and commerce," according to a report released on Sept. 21 by Consumer Action and the Consumer Federation of America (CFA).

The study examined the potential harms to consumers if high-speed access facilities are not open to all Internet service providers (ISPs) and concluded that Congress and the FCC have erred by not imposing an open access requirement.

'Two private toll roads'

"This analysis makes it clear that neither the cable companies nor the telephone companies should be allowed to pick and choose which ISPs may provide consumers access to high-speed Internet connections," said Ken McEldowney, executive director of Consumer Action and president of the CFA. He said that "the effort to impose private regulation on the Internet in the form of exclusive, discriminatory access is a dagger pointed to the heart of the Internet."

"Local phone companies must live up to their duty under the Telecommunications Act of 1996," McEldowney contended, to provide open access to their high-speed networks." Furthermore, he said "they should not use the efforts of cable companies trying to close off their broadband 'pipe' to unaffiliated ISPs as an excuse to push policymakers to eliminate telephone company obligations to run an open network." If cable and telephone companies are permitted to close their Internet access facilities to other ISPs, McEldowney claimed, "the potential end result will be a disaster for the consumers — two private toll roads and no open access lanes on the information superhighway."

McEldowney supported local government intervention in the open access debate. "The local governments that have been insisting on open access have stepped up to defend consumer interests by filling a void left by federal regulators," he said.

Amidst "unprecedented consolidation and control in the cable TV industry," the two consumer groups said their "central concern is that AT&T is pursuing policies that will not only preserve the cable TV video

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Fairfax City, Va., imposes open access on Cox

Another municipality has joined the open access fray by voting to require a cable operator to open up its network to competing Internet service providers (ISPs).

The Fairfax City, Va., City Council voted Sept. 29 to impose an open access condition on the transfer of the Media General cable system to Cox Communications Inc. The council voted unanimously to transfer the franchise to Cox, but then added the open access amendment. By a 4-2 vote, the franchise transfer condition stipulates that Cox must "provide any requesting Internet service provider access to its broadband Internet access transport services ... on rates, terms, conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person."

Fairfax City joins Portland, Ore., and Broward County, Fla., as localities that have imposed open access conditions on cable operators. The municipality represents less than 5 percent of the population of Fairfax County, Va., and the transfer affected only 5,600 of Cox's subscribers in the county.

Scott Silverthorne, a councilman on the Fairfax City Council who supported the open access condition, said, "our decision was not the result of a national campaign effort." He added that "by taking this action and supporting open access, we have ensured that our citizens will continue to have the freedom to choose their Internet provider ... we hope other jurisdictions in Virginia follow our lead."

"We applaud the Fairfax City Council," said Rich Bond, co-director of the OpenNET Coalition, an advocacy group comprised of over 800 technology companies and ISPs supporting an open access cable Internet policy. "Consumers should have the right to choose whatever Internet service provider they want and cable companies should not be allowed to eliminate that choice by closing their networks to competition," he added.

The National Cable Television Association (NCTA) criticized Fairfax City's decision, declaring that the vote by the municipality "underscores why 30,000 local franchising authorities across the U.S. should not be making scatter-shot decisions about national telecommunications policy." NCTA said that "following a closed-door session, and without public input or debate, the Fairfax City Council voted to impose common carrier-type requirements on Cox Communications," yet the municipality lacks "the legal authority to impose such conditions." Furthermore, the cable trade group claimed, "this forced-access policy will only serve to slow deployment of high-speed Internet services to consumers."

Impact of new services, open access highlighted

The challenges posed by new services and the contentious issue of cable open access dominated the National Association of Telecommunications Officers and Advisors (NATOA) annual conference Sept. 15-18 in Atlanta, Ga. The conference's theme, "Telecommunications Transformation," referred to what is happening to the telecom industry — mergers, acquisitions, joint ventures and other business realignments — and the pressures and responsibilities imposed on local governments to respond to these new challenges.

Overcoming the digital divide

"Local governments have the responsibility to close the digital divide," declared Atlanta Mayor Bill Campbell in a speech before NATOA members. "If America doesn't grow together, this chasm will cause all of us to suffer," he added, contending that "the issue of Internet access is an issue of power in the next century," and claiming "the digital divide will affect all of us."

Campbell said three studies on the digital divide have found that "there's a major gap between white and black and Hispanic, rich and poor and urban and rural areas." He made the following recommendations to local officials for overcoming the digital divide:

• representatives of federal, state and local governments must make information technology widely accessible;

• industry must keep certain technologies affordable so schools and rural areas can use them;

• processes must be established for minorities and women to own telecommunications systems; and

• information technology must be used to educate the nation.

"This issue is important for us at the local level," Campbell said, "because you must make certain that technology — which increasingly has the potential to unite the world" — is not used "to divide us as well."

"If people don't have access to the information superhighway, if children are not connected, they will never catch up," Campbell told NATOA conference attendees, adding that many people "are already starting behind and the digital gap is widening." For example, he said, 20 percent of all universities now require students to have their own personal computers. "If blacks, Hispanics and rural residents don't have access and the digital divide is getting wider, this will create a major repercussion for the 21st century: a widening gap and growing underclass with no access to technology."

A critical step to overcoming the digital divide, Campbell suggested, is to make sure that the e-rate or universal service provisions of the 1996 act are implemented. He criticized telecommunications companies for agreeing to the e-rate provisions as part of the 1996 Telecommunications Act and then lobbying to have these obligations reduced.

Campbell advised local governments "to do what you can and get involved in the issue" such as the wiring of schools and libraries. He said the National League of Cities, the U.S. Conference of Mayors and the National Association of Counties are laying out a consistent strategy to oppose the telecommunications industry's lobbying of the FCC to reduce universal service.

Crumbling regulatory distinctions

The distinction between Title II and Title VI regulatory regimes "is crumbling," said Susan Littlefield in a NATOA session on national and local regulatory policies, because "bundling, privacy and customer service standards" are concerns of both cable and telecommunications.

"Massive consolidation" has been a major legacy of the 1996 act, said Jane Lawton, outgoing NATOA president and cable administrator for Montgomery County, Md. "Local officials haven't yet seen competition, only higher and higher rates ... with no increase in customer choices." She remarked that "state regulators have been called upon to act as local officials and are now being challenged at the state level." With an increase in local competition court cases, she said, "the role of local officials is heightened."

Lawton warned that with "both new and incumbent companies able to use technology in their marketing to determine what customers want," privacy is becoming a chief concern.

Indeed, she said, "the regulatory processes used in the past are truly challenged ... and local officials face a huge challenge of redefining their roles." She contended that "local officials are closest to the customer" and need "to look out for small business users and residential customers that are often not getting the best service."

Madie Gustafson, senior vice president, franchising and local government affairs for AT&T Broadband and Internet Services, asked local officials for "patience because the Title VI regulatory model doesn't match our business model anymore" as AT&T's business model is not premised on a franchise-by-franchise basis. On the issue of open

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access, she asked, "are we in the business to provide forced access to our competitors?" Open access would be contrary to the "way our systems are built, regulated and configured."

With regard to the jurisdictional dispute over public rights-of-way, Gustafson said AT&T "often gets into these disagreements because some communities want to take the cable franchise model and apply it to the rights-of-way model." Technical standards mandated by local governments is also a contentious issue, Gustafson said, and warned that since AT&T "doesn't build its cable systems on a community-by-community basis, it will fight this issue hard."

Mega-mergers

"Are mergers good or bad?" asked John Pestle, an attorney with the Grand Rapids, Mich., law firm of Varnum, Riddering, Schmidt & Howlett, L.L.P., in a general session on the impact of mergers on consumers and the marketplace.

Pestle posed seven questions to assess whether the 1996 Telecommunications Act and the subsequent flurry of mergers has been beneficial to consumers:

- Is there increased phone competition?
- Will competitive phone service be available to ordinary citizens?
- What is the quality of the service?
- Are companies controlling too much programming?
- What is the state of competition between companies and has competition been eliminated through mergers?
- What is the effect on the overall multichannel video market from DBS, cable overbuilders and wireless providers?
- Is the old Bell monopoly being recreated?

The best opportunity to offer competing telephone service is through cable, said Steve Davis, vice president, law and government affairs for AT&T, adding that the cable plant allows AT&T "to provide competing local telephone facilities" and be "an end-to-end provider." Specifically, Davis claimed the telecom marketplace has benefited from AT&T's entrance in the Internet access sectors, because "competition flourished after AT&T offered high-speed service," resulting in "immediate price reductions" offered by DSL providers.

Angela Campbell, a professor at Georgetown University Law School, had a less sanguine view of the benefits of telecom mergers, finding that there is now "unprecedented market power in many different markets" by MSOs, cable programmers and broadband providers. She warned of "an unprecedented power over information and programming" by these providers that highlights "the importance of free media in a democratic society." Specifically, Campbell raised concerns that AT&T would now control the majority of cable subscribers and that the company's policy of precluding access to independent ISPs "is very troubling" and could undermine free speech.

AT&T will not control 50 to 57 percent of all cable subscribers as some critics have contended, Davis said, claiming that the company "will only control 25 to 26 percent of these subscribers." He vowed that the company "would not have control over programming decisions." Campbell contended that AT&T's minority cable interests need to be taken into account in fashioning a national ownership policy, adding that "the FCC is concerned about influence [of minority shareholders like AT&T], not just control over decision making ... AT&T has not made a good case for why it needs MediaOne to provide telephony."

Open access: good or bad idea?

"Is open access a good or bad idea and how should cities deal with it?" was posed at a general session on the most contentious cable issue currently before local governments.

"This issue is not going away and is going to be on your plate and will be before you in every possible way," argued David Olson, cable communications director for the city of Portland, Ore. Olson was confident that the U.S. Court of Appeals for the Ninth Circuit will decide that local government authority to mandate open access will be confirmed. He was critical of the FCC's decision to take no action on the open access controversy, which, he said, compels local governments "to do the heavy lifting on this issue."

"There was only one dissenting vote among Portland and Multnomah local politicians," Olson said, indicating that most of Portland's local officials were receptive to the idea of open access. He expressed "shock that this issue became such a big deal because the Internet has flourished on open access."

The cable industry's closed access argument hinges on three contentions, Olson said:

- open access on cable modems will discourage investment;
- open access is technically difficult or impossible to accomplish; and
- it is not good to interfere in the marketplace.

Claiming that cable has a 90 percent share of the broadband market and its penetration is growing

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exponentially, Olson said that "everything we have learned about this issue has buttressed the open access argument, including many neutral and impartial sources" such as Merrill Lynch and other Wall Street firms, which have concluded that open access would be positive for the cable industry.

In addition, Olson quoted a recent report by the Berkeley Roundtable on the Internet Economy, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing Is Doing Harm*, that was critical of the FCC's stance on open access. The report said, "While the FCC may believe such inaction simply continues its 'unregulation' of the Internet, we should be clear that nonintervention constitutes instead a fundamental policy reversal. For 30 years the consistent FCC policy has been to foster competition, in particular cost-oriented access to essential local network facilities, and to promote an open network architecture. Far from nonintervention, this has required sustained policy intervention to keep the U.S. communications infrastructure open. Having misread its own history, the FCC now risks misinterpreting Hippocrates: 'First, do no harm' is not quite the same as 'first, do nothing' and in this particular case, doing nothing is doing harm."

Whatever the jurisdictional outcome of the Ninth Circuit's decision, "we're still left with the question of whether the decision to regulate cable companies and impose open access is good public policy and good for customers," said Scott Morris, AT&T vice president for local government and external affairs. He was critical of the Berkeley report's conclusion about the FCC's role in the issue, claiming, "the FCC has not taken a do-nothing attitude on open access. It looked at the issue closely in terms of the AT&T-TCI merger and broadband deployment as a whole" and determined that "the best approach is to encourage investment in new facilities and let the market play out."

As for cable modem service, Morris contended there are already a number of options from a consumer's viewpoint because users "can avoid @Home or RoadRunner content if they want to." He also characterized Olson's claim that cable has a 90 percent share of the broadband market and that cable is monopolizing Internet access as baseless. He said there are currently 32 million Internet subscribers, with AOL garnering 18 to 20 million of those. With only one million cable modem service subscribers, Morris said, there "is no indication that cable modem service is dominating the marketplace."

However, Dave Baker, vice president of legal and regulatory affairs for MindSpring, an Internet service provider, said that "city officials have the best understanding of local needs ... and do have the authority to make open access decisions." From a regulatory perspective, he contended, "as cable service is upgraded to offer new services, local jurisdiction also expands over the service."

The open access dispute raises "a danger that cable companies are riding in a Trojan Horse," Baker said. This is because, he said, the cable companies are claiming that open access conditions will impair their ability to offer local telephone competition, yet "their message is already softening as they begin to provide Internet access and now say that 'sometime in the future we'll get around to telephone service.'"

Baker claimed that "the central issue is: What is open access?" He insisted that "cable operators often purposely misstate the issue." The dispute is not about "open access to content ... but the access to see that content through the access provider of one's choice." Local phone companies do not force subscribers to receive their ISP to get Internet access, he said, but under the cable model, "you have to purchase its affiliated ISP." The result, Baker said, "is that citizens are limited to just the cable company's ISP."

Rights-of-way

"Most of the cost-based rights-of-way fees have been reactionary," said Connie Cannady, president of C2 Consulting Services Inc., in a panel discussion on managing public rights-of-way. She contended local governments often settle on imposing standard fees after competitive providers are already seeking to use local rights-of-way, when they "need to be more pro-active and develop their own cost-based analysis."

Cannady said there are two components of rights-of-way costs:

- the rights-of-way rental value, which includes the investment into acquiring and building the rights-of-way, which, she said, needs to be conceptualized as a return on investment; and
- the annual cost to manage and maintain the rights-of-way, which could include GIS mapping, street maintenance, legal costs and permitting, and barricade costs.

Tillman Lay, an attorney with the Washington, D.C., law firm of Miller, Canfield, Paddock & Stone, reminded conference attendees that "the telecommunications use of rights-of-way is completely different from cable service" because "there will be — or al-

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ready are — multiple users of the telecommunications facilities in the rights-of-way." This necessitates implementing "a process to deal with these new users," he said.

Another difference with cable franchising, Lay said, is that disputes between the franchiser and the operators were often worked out. However, he said, "for rights-of-way, it's a little bit different because you are dealing with a variety of operators — the Bell operators, GTE, alternative and wireless providers," and an agreement struck this year with one set of providers might be challenged in court next year by a new provider seeking to use the rights-of-way. "If you draft a bad rights-of-way agreement you will be sued," Lay declared, "and, unfortunately, if you draft a good rights-of-way agreement, you're going to be sued."

If lawsuits are possible, how does a franchiser mobilize the locality's legal staff to take a chance on crafting a rights-of-way ordinance? "First of all," Lay contended, municipalities "need to get a hold on accurate costs and the return on assets" for using public rights-of-way. Also, he warned, be aware that simple gross revenue fees may not be recovering the full costs of using the rights-of-way. He advised local officials "to show leadership on what the real costs are to get their attention because local governments need to realize how much it is costing them each year to have numerous providers using the rights-of-way. "If you don't do anything, Lay admonished, "you'll have holes in your city budget and in your streets."

Look at current costs

To undertake a cost-based rights-of-way approach, Cannady recommended that franchisers "take a look at what the current costs are to any utility — electric, water or gas — operating in your streets" and value the land that is being used for rights-of-way and the portion accessed by utilities.

Lay also recommended studying state law to determine if rights-of-way are governed on the state level. He said that Section 253 of the 1996 act "gives you more leeway than state law." Lay claimed that most telephony providers do not want communities to do a cost-based approach to rights-of-way because they would like to simply pay 4 percent of gross revenue fees to every single community and "avoid 30,000 different cost-based approaches." He said new providers also "think local governments will not actually do a cost-based model and let industry just pay the 4 percent fee." Indeed, Lay contended, "there are costs that local governments won't even think about" that should be included as part of rights-of-way costs. He advised local officials "to not assume that the fee is a small number."

Transfers

"There's no federal statute that defines the scope of local authority for transfers," said Stephanie Phillips, a lawyer with the Washington, D.C., law firm of Arnold and Porter, in a session on the lessons learned from cable transfers.

She said the 1992 Cable Act "addresses what local governments can do in the renewal process in which there are detailed federal statutes establishing standards and steps to be taken — but this is not the case in the context of transfers." Cable operators have contended that franchisers may only consider the financial, technical and legal qualifications of the operator in a franchise transfer, she said.

Phillips argued that "the legislative history of the Cable Act would support that local governments do have the authority to raise compliance and service issues." She recommended that franchisers include "a side letter or full agreement that would prevent waiving any rights in the transfer process." Phillips claimed that "FCC Form 394 contains several questions relating to services and the impact of the transfer on rates" and that 1992 act conferees "contemplated that local governments could request additional information related to services and rates." She added, "it's quite appropriate for local governments to ask additional questions ... so the community has an idea of what will happen in the future." With many MSOs such as AT&T raising expectations about new service bundling, "it's only appropriate that a local government ask for more substance behind the promises," Phillips said.

Marlin Blizinsky, assistant project manager for the King County, Wash., I-Net project, reminded conference attendees that localities can insist on a local ordinance or provision in their franchises that could require a local review of a transfer.

"A transfer is a good time to get certain issues resolved," Phillips recommended, although "in many cases it is quite difficult to resolve all matters within the 120-day timetable" set by the Communications Act to complete transfers.

Blizinsky recommended that there "is often a difference in expectations between cable companies and local governments" in the transfer process. Franchisers, he said, "often want to deal with past bad acts of the incumbent operator and the local franchise authority sees the transfer as a last opportunity to take care of these problems." However, he said, cable operators tell him that they should not have to deal with the problems of the previous operators.

"If Congress and the FCC wanted to give unlimited authority to franchisers in transfers, they

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would have done so," said Celeste Vossmeyer, vice president, government affairs for Charter Communications Inc. While she insisted that franchisers must limit their transfer review to the financial, technical and legal qualifications of the operator, she encouraged local governments to tell Charter upfront what the problems are with the current operator it purchased. And, Vossmeyer told franchisers, "don't wait 90 days into the 120-day process to inform [her] of a problem."

Should franchisers expect to take care of outstanding issues prior to signing a transfer? "It depends on what the problem is," Phillips said, "and how far along the parties are in resolving the issue." For example, she said, specific customer service issues might be resolved "while bigger issues such as a failure to build an I-Net" may be difficult to resolve within 120 days.

Blizinsky said that local governments "view the transfer process as a time of leverage," adding, "it's foolish to insist that every problem can be resolved in the transfer process and it's also foolish to not have a plan to resolve these problems."

Comcast's pledge

Even as Comcast Corp. continues to grow, the company's roots were "founded in a decentralized philosophy that empowers the person who runs the system in your community to make decisions," declared Comcast President Brian Roberts to a NATOA audience. He pledged that franchisers should expect that approach to remain the same. Also, Roberts said, state-of-the-art technology "is only half the story" and must be matched with "world-class service" to make an effective broadband provider.

Steve Burke, Comcast's president of cable operations, said that the MSO will be doing over 1,000 transfers in the next year and told franchisers that Comcast "remains committed to acting like a small company." There "is only one way to run a successful cable system and that is by putting authority in the local management team."

Highlighting the great changes sweeping the telecommunications industry, Burke said five years ago cable was "an analog business delivering TV signals; now, it is primarily a digital business ... and instead of being a TV business, operators now provide a variety of services." He claimed that "this is just the beginning" with a "virtual cascade of new products to follow."

Burke informed franchisers that "83 percent of its subscribers are in rebuilt systems" and the company "is very well clustered." He said that the MSO needs big clusters to achieve economies of scale for marketing, implementing new technology and containing costs. He reported that Comcast is rolling out new services, including marketing digital services to 80 percent of its subscribers. Burke also promised that "price increases would be reasonable" and that, "clearly, we see telephony as a part of our future" and speculated that a joint venture with AT&T could be possible.

On the contentious open access issue, Burke claimed that "there is open access and I hope it does get worked out." With one-third of cable systems recently changing hands, Burke concluded that "this is a difficult time [for franchisers] due to consolidation, but in one year, most of these difficulties will be behind us."

Renewals offer new beginning for cities, experts contend

Franchise renewals offer cities a new chance to plan their telecommunciations infrastructure, according to franchise experts in a session at the NATOA annual conference in Atlanta, Ga.

Skip Munster, director of the Telecommunications Management Division for Fairfax County, Va., examined the "thinking process" that shaped Fairfax's recent renewal of Media General Cable's franchise. Munster admonished conference attendees "to take the renewal process seriously because it presents an opportunity to plan what your community's infrastructure will be in 10 to 15 years" from "an economic development, education development and government efficiency" perspective.

Cox recently paid $5,400 per subscriber for Media General, Munster said, because it expects to earn revenue "from a whole spectrum of services" and franchisers should treat the renewal process from a similar perspective. "You should treat the renewal not just as a cable service, but also from the perspective of Internet service, high-speed access and telephony." Thus, he said, Fairfax created an extensive model of what revenue, capital expenditures, cash flows and the estimated future value of the cable system to determine what the cable operator is capable of paying for. "If you don't know what the operator is capable of, it's pretty hard to know what to demand," Munster contended.

Also, he said, "if you're not in the habit of negotiating renewals, get someone on your team who does or you could be outgunned early by an operator's corporate attorneys."

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RENEWALS—

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In the ascertainment process, where community needs and interests are defined, local governments should "create a legal defense if you ever get to the franchise denial point," Munster said, adding that determining these needs "is the single most important thing we did." He said Fairfax's renewal process also included conducting:

• four focus groups;

• a compliance and compliant review of Media General;

• an institution ascertainment;

• a technology study of what the county needs;

• a citizen telephone survey that included surveying noncable subscribers about their cable and telephony needs; and

• a test and inspection of Media General's cable system.

In addition, Fairfax met with the county's consumer protection commission about the renewal.

The rebuild process in the new franchise, Munster said, required a hybrid fiber coaxial system that would average 500 homes per node, required a battery backup system for electronic components and mandated a centralized monitoring system.

Munster also said subscriber feedback determined that they wanted more a la carte program packages and alternative services such as telephony. And, he contended, Fairfax's renewal mandates "audio leveling between channels, which requires there to be a computer-controlled standard volume level from channel to channel."

The franchise mandates a four-year construction schedule, Munster said, and its 15-year franchise term is necessary because "it's very clear that if you want to stabilize rates, you have to give the cable operator the time to recoup its investment." However, he said, the franchise does contain "a 10th anniversary review" in which the county "can ascertain if Media General has continued to meet its needs, and, if not, a renewal can be triggered." This provision does not apply if effective competition exists.

Munster also highlighted Fairfax's performance guarantees and remedies in the new franchise which, he said, "improve remedies for customer violations." For example, "missed appointments, a failure to disclose price terms or a failure to respond to complaints in a timely fashion could result in fines." Munster instructed conference attendees that the threat to access an operator's $50,000 security fund is a strong incentive to prevent them from committing violations. "It looks bad to shareholders on the balance sheet that this fund had to be accessed," he said, and "is a very interesting lever" over the cable operator.

"Document, document, document" if franchisers want to make the renewal process easier, warned Jeffrey Neidert, municipal cable coordinator for the city of Brunswick, Ohio.

Neidert said his office did not have a policy to document cable complaints in its highly publicized renewal dispute with Cablevision Corp. (see June 1999 *Monthly Bulletin*, page 5). Also, he said, "be sure to have all of your facts straight and be sure you know what your community wants" in the renewal process. In retrospect, he added, one problem in its fight with Cablevision was that "the city council did not effectively go after the cable company" and fine the operator for violations in the initial franchise. ▶

Kennard, Sachs oppose cable access regulation

"If what you want is rapid broadband deployment, and local telephone competition, then I urge you to allow cable's high-speed Internet service to develop free of government regulation," declared National Cable Television Association (NCTA) President and Chief Executive Officer Robert Sachs before an audience of local officials at the NATOA annual convention in Atlanta.

The FCC also opposes further regulation of cable Internet access. Calling broadband "the most important issue on our agenda today," FCC Chairman William Kennard told conference attendees that regulation of cable Internet service would be premature.

NCTA opposes 'forced access'

Sachs reminded local officials that NCTA and NATOA "have stood shoulder-to-shoulder in fighting attempts by some multichannel video providers to evade local franchise obligations." These efforts have included, he said, "a joint friend-of-the-court brief in the *City of Austin* case where SBC sought to avoid municipal regulations by offering video services through its telephone affiliates." And, "NATOA and NCTA counsel appeared side-by-side in the federal appeals court in Chicago seeking reversal of the FCC's ECI decision that created a loophole in the definition of a 'cable system.'"

Addressing the regulation of new advanced services such as high speed Internet and switched local telephone services, Sachs asked local officials "to consider whether government regulation of these new and highly competitive consumer services is necessary or appropriate as a matter of public policy."

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NATOA SPEECHES—

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Sachs outlined some of the important policy implications of forced access and discussed why it is premature to impose rules on cable Internet access. He contended that "cable modem service is still very new" and "represents about 2.5 percent of the domestic Internet access market." Also, Sachs claimed, "cable is by no means alone in providing high-speed Internet access" as "telephone companies, electric companies, fixed wireless and satellite companies are rolling out high-speed Internet services."

For example, he said, "in the last six months, the number of digital subscriber line (DSL) customers has doubled" and DSL "is expected to be available to more than 38 million U.S. homes." AOL's $1.5 billion investment in Direct-PC and MCI and Sprint's wireless cable systems also represent high-speed access competition, he said.

OpenNET criticized

Sachs was critical of the OpenNET coalition "launched by AOL and the incumbent local phone monopolies," claiming that "this campaign is not about open access to Internet content, as the OpenNET coalition has portrayed." He questioned, "Why are regional phone giants like Bell Atlantic, SBC and U S West spending vast legal and political capital to force cumbersome regulations on cable operators, when at the same time the Bells are building their own competing DSL facilities that are not dependent on cable?"

The answer, Sachs contended, is that "local phone monopolies would like to derail cable as the only real competitor to local phone service." Indeed, he said, "when a cable system is rebuilt to provide high-speed Internet services, it can easily carry telephone traffic." Thus, "what scares GTE and the regional Bells is the threat of a competitor using its facilities to provide voice, video and data."

The only way GTE and the Bells "can maintain their towering market share is to saddle cable operators with cumbersome regulatory requirements that slow the deployment of competitive high-speed Internet service and telephony." Having failed to convince the FCC to adopt open access requirements, Sachs told local officials, "they want you to do their bidding."

Contrary to the claims of the OpenNET coalition, Sachs said, "it is clear that competition and customer choice are increasing, not decreasing" in the Internet access market. He challenged local officials to "ask yourselves whether broadband deployment ... is more likely to result from competition among cable and other broadband infrastructure providers, or from cumbersome government regulation."

Kennard: open access rules unnecessary

Kennard told the NATOA audience that federal regulation of cable Internet service was unnecessary at this time and would undermine the prospect of having "multiple broadband pipes — cable, DSL, broadband wireless, satellite, terrestrial broadcast — in every home." Thus, he contended, "that is why I think the debate we are having today about unbundling and access to the cable pipe is fundamentally different from the debates we had about the telephone industry, when everybody knew that we only had one wire for the foreseeable future."

Characterizing the open access dispute as "a transitional debate" because the broadband technologies and services are changing so rapidly, Kennard said that "we should resist the urge to regulate because I think that it is likely that the market will sort this out." He said that "there are market incentives that will drive openness in the broadband world" such as "the prospect of alternative pipes" serving consumers and "the culture of the Internet that has grown up in this country."

Regulation has costs

Also, Kennard contended, "we must recognize that regulation has costs." For example, he said, in the process of writing nondiscriminatory open access regulations, the commission would have to define what discrimination means, the terms and conditions of access and pricing "that inevitably get drawn into these issues of nondiscrimination." Regulators would have to create a pricing model, Kennard claimed and "you have to have a means to enforce them in a meaningful way." This type of regulatory regime would resemble the complex rules governing local telephony, he said, which would be less attractive than a market-based solution.

"What I am hearing on this issue is a lot of rhetoric that the sky is falling, but when I look out in the marketplace and see only a million cable modem subscribers and about 200,000 DSL subscribers," Kennard told local officials, "my first reaction is to allow the marketplace to play out for a while before we step in and start regulating."

E-mail us with

questions at

tube@thompson.com

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monopoly, but extend the cable model of a closed proprietary network to broadband Internet services." This is occurring, they said, "at the very moment that new technologies could free consumers from what the Department of Justice has called one of the nation's 'most durable and powerful monopolies.'"

The report found that "AT&T's claim that it will keep its cable network open by providing 'one click access' to the Internet is utterly deceptive." In fact, the report said, AT&T's subsidiary @Home "imposes significant restrictions on access," including:

- discriminating against unaffiliated ISPs in the price and quality of service because certain services are precluded from being sold and consumers must pay twice for access to unaffiliated ISPs — once to AT&T/@Home and once to the ISP;
- controlling the boot screen that the subscriber sees, "which creates the potential to steer customers";
- controlling the network "confers an insurmountable information advantage on the cable system operator for gathering consumer data and targeting consumers"; and
- limiting the amount of streaming video that could be downloaded by customers.

The report also documents how telephone companies are attempting to close their networks for advanced services.

In addition, the study determined that "financial analysts believe it would be economically viable to deploy broadband as an open network," especially because open access would stimulate "more rapid deployment of broadband services."

The report concluded that open access "is the right public policy" because it protects free expression. If both telephone and cable networks insist that Internet "distribution and content be linked," the consumer groups said, "we would end up with a choice of a very few, private toll roads on which affiliated information service providers get the best treatment."

NCTA response

The National Cable Television Association (NCTA) took issue with the consumer groups' conclusions. "The study misrepresents marketplace conditions as well as the negative impact that government regulation would have on broadband deployment and consumers," the NCTA contended. "The facts are clear," the trade group said. "Cable's deployment of high-speed Internet has spurred competition and decreased prices for consumers."

"This debate is really about government regulation of the Internet," the NCTA claimed, adding that "those who seek to advocate government regulation — AOL, GTE and the regional Bells — seek to protect their own dominant market positions and eliminate competition."

Playboy asks Supreme Court to affirm scramble ruling

Playboy Entertainment Group Inc. filed its brief Oct. 4 with the U.S. Supreme Court, seeking to have affirmed a lower court decision that struck down a controversial federal provision requiring certain programming to be "scrambled" so that children could not accidentally view it.

In December 1998 a provision of the 1996 Telecommunications Act that requires cable operators to scramble sexually explicit programming was declared invalid by the U.S. District Court for Delaware (see February 1999 *Monthly Bulletin*, page 8). Playboy asked that court to invalidate the provision on First Amendment grounds. In its place, the court ordered that a less restrictive federal blocking provision be implemented.

District court ruling

Section 505 of the 1996 act added new language to the Communications Act, requiring the scrambling of sexually explicit adult programming in homes. In its §505 rules, the commission limited the hours during which sexually explicit programming may be shown on unscrambled channels to so-called "safe-harbor hours," prohibiting the transmission of such programming on any adult channel between 6 a.m. and 10 p.m. if it is not fully scrambled or blocked.

The commission defined "scramble" as "to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner." The government sought to ensure that during the hours when children are likely to be watching television, signal bleed cannot occur, which is when a discernible video and/or audio appears on a cable customers' television even though they have not purchased the service.

Finding the scrambling provision unconstitutional, the district court said that, "Although §505 is aimed at preventing signal bleed, a content-neutral objective, the section applies only to signal bleed occurring during the transmission of 'sexually explicit adult programming or other programming that is indecent.'" For example, the court noted, signal bleed from the Disney Channel "does not come within the purview of this statute." Thus, the court reasoned, "Congress' targeting of signal bleed of

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solely sexually explicit programming is a content-based restriction."

Also, the court rejected the Government's argument that complete scrambling was necessary to protect the right of the individual to be left alone in the privacy of his or her home. As an alternative to §505, the court ruled that §504 of the Communications Act, which allows subscribers to fully scramble or block audio and video signals, is a more effective provision, and is less restrictive of First Amendment rights.

Playboy brief

In its brief to the Supreme Court, Playboy said the §505 restriction imposed "on Playboy's speech violates the well-established principle that a governmental interest in preventing access by children to sexually-oriented material does not justify an unnecessarily broad suppression of speech addressed to adults."

Also, the programmer said, the government ignores the technical distinctions between cable and broadcast television, especially the impact of restricting programming in the 6 a.m. to 10 p.m. time period, "a restriction on speech" that "is far greater for cable television because it restricts entire networks, as compared to that for broadcasting, where enforcement affects only the scheduling of a particular program."

"Because of the inherent vagueness of the indecency standard, aggravated by the particular mandate of Section 505, and the FCC's steadfast refusal to clarify the law," Playboy contended to the Court, "cable operators had no choice but to censor all of Playboy's programming during nonsafe harbor hours."

Playboy also said the Court should conclude that the government's concern about the harms of signal bleed are unfounded. Playboy's programming is rescrambled by cable operators, which restricts access to the programmer's channel to only those who have paid for the service.

Playboy said, "a variety of nonregulatory means are available to consumers to ensure that they do not receive signal bleed" such as cable television converters with channel mapping features. In addition, Playboy said, many televisions and VCRs "already have built-in child-lock circuitry that allows parents or others to completely lock out the audio and video of any channel, thereby preventing signal bleed."

Playboy urged the Court to agree with the lower court that Section 504 of the 1996 act "provides a content-neutral alternative that is tailored to those households that actually receive signal bleed." ◗

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Attachment Y
3rd Affidavit of Michael R. Dunn

Y

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Cable World

Building Cable's Big Pipe

Cable operators are in the midst of completing billion-dollar, two-way rebuilds over the next two years. Once the construction is completed, the stage will be set for all manner of new interactive video, voice and high-speed data services. The pay off, operators hope, will be to generate new revenue streams from new technologies.

By Jim Barthold

It's always been cable's technological manifest destiny. Build a bigger and better cable system and sell more services to consumers.

As cable heads toward the millenium, today's construction fervor is being ignited by the prospect of potentially lucrative interactive video, high-speed data and telephony services.

But there's one added element to the mix: AT&T Corp. Now an equal partner in cable's MSO fraternity, the giant telco's arrival has lent a sense of urgency and, frankly, confusion to the industry's 1999 goals.

By acquiring Tele-Communications Inc. and partnering with a bevy of others for local telephony services, the telecommunications giant refocused and, potentially skewed, cable's course.

As a result, operators agree on only one thing: the nearly complete hybrid fiber coax (HFC) networks will handle whatever services are to come; it's just a matter of prioritizing.

Brian Roberts, president of Comcast Corp., acknowledges that cable is a "bandwidth king" with the opportunity to offer digital video, voice and data, although not necessarily in that order.

"This industry is going to be a serious player in telephony," he predicted, neatly sidestepping how his company will deliver it.

But, he emphasized, that's the long-range, not short-range target.

"You have to step back and say: 'Where are we headed?'" he explained.

The answer, he said, is straight ahead - and fast - with digital deployments.

"We feel the digital box is where we want to step the hardest on the pedal," said Roberts.

Others throughout the industry shared that viewpoint. The lack of certified, interoperable OpenCable digital set-tops or point of deployment (POD) modules this year won't stop the industry from pushing out proprietary products to the farthest reaches of networks that will be about 60% two-way complete by year-end.

Tony Werner, TCI's executive VP-engineering and technical operations, is a long-time believer in digital deployments. AT&T's presence only strengthens that resolve.

"Our objective is to get digital out as widely as we possibly can," he said.

Werner said that TCI had upgraded about 20% of its systems to two-way at the end of last year, with more than a million digital subscribers already on board. An accelerated effort this year will push that number closer to 60%, he said.

"We are very bullish on the dense WDM (wave division multiplexing) and we're continuing that with high speed," he said.

DWDM puts more equipment in the hub and less in the nodes, making it a less expensive architecture to put in place.

Digital will mark its full-scale presence for the first time at Time Warner Cable this year, as the MSO deploys volumes of Scientific-Atlanta Inc. Explorer 2000 set-tops.

"We'll launch it with broadcast services, but once we've got those under our belt and are operationally comfortable with those, it's just a matter of installing more equipment at the headend to add more services," said Jim Chiddix, Time Warner Cable's CTO.

Time Warner will have about 85% of its plant upgraded to two-way by year's end, providing a nice platform on which to implement interactive services, Chiddix said.

"Digital has come on much more slowly than first projected," he explained, discounting the seemingly rapid pace at which operators are now deploying it. "What we've learned over the last 10 years is that cable has a massive infrastructure and even after the technology is at hand to do new things with it, it takes years to move that into the marketplace."

Thus, what seems slow is fast, he said.

"It will take years for the new services that are now at hand to be available ubiquitously and to find out all new ways to market them and to work out business relationships that surround content and so forth, but we're launched. We've departed on that trip and, in hindsight, it will come rapidly; from a weekly magazine's perspective it will come very slowly," he said.

To be ubiquitous means to be interoperable, an OpenCable goal that has, to date, not been realized by the industry's two leading vendors, General Instrument Corp. and Scientific-Atlanta, who have yet to fully share their access control secrets as required under the Harmony agreement. This, at least indirectly, led MediaOne Group to a box order that uses a Digital Video Broadcast (DVB) open access scheme provided by Royal Philips Electronics NV of the Netherlands.

Through this order the MSO is "trying to get global scale into this box and break the back of proprietary" systems that are slowing full-scale roll-outs and retail opportunities, said Bud Wonsiewicz, MediaOne's SVP/CTO.

While OpenCable remains the end game, and this order fits into its overall scheme, it is important to open up a multi-vendor environment so operators can "select the best piece of consumer electronics to work on our network," Wonsiewicz said. The goal, he added, is to "embrace OpenCable and bring in DVB multi-access."

MediaOne expects to have 70% of its plant upgraded to two-way by the end of the year, Wonsiewicz added.

Another MSO taking dead aim on the new services available via upgraded networks is Bresnan Communications Co. Ltd.

"HFC has definitely made a difference to how possible everything is," explained Gary McIntosh, VP-engineering, who said Bresnan is developing "inter-city networks" that link systems and consolidate operations.

Bresnan, like other MSOs, is heavily deploying 750 MHz networks, while toying with some 860 MHz product.

"We really don't see a large reason for going to 860," McIntosh said, noting that today's gallium arsenide (GaAs) technologies leverage the capabilities of 750. This, though, could change.

"It's almost getting to the stage where (860) might be an offer too good to refuse, but it might be a qualified 860," he explained. "The central part of the network might be 860, but we might qualify levels at the taps for particular types of services."

Those services would certainly include high-speed data, via proprietary and, the operators hope, interoperable Data Over Cable Service Interface Specifications (DOCSIS)-certified modems this year.

"There are no shortcuts" when it comes to using HFC networks for data, McIntosh warned. "Don't try to save a few pennies by trying to squeeze the last thing out of your design or out of your laser by splitting too many times."

Data delivery offers a plethora of opportunities, not the least of which is enhanced electronic commerce, said Comcast's Roberts.

"I strongly believe it can become another new business for companies like Comcast," he predicted, pointing to the MSO's success with shopping channel QVC as evidence that consumers will buy over-the-air.

"At Comcast, we are clearly focused on this new revenue opportunity," he said.

Standardized, interoperable, portable modems will greatly enhance that opportunity. Among other things, they can be sold at retail and take the cost off the operator's books. Also, original equipment manufacturers (OEMs) will be more willing to stuff cable modems into their computers, obviating the need for MSO home installation.

While MediaOne will continue to roll our proprietary modems, "we're definitely committed to DOCSIS," said Wonsiewicz, echoing the sentiments of operators such as Mark Coblitz, Comcast's VP-strategic planning, who added, "The goal is to transition to DOCSIS as fast as we can."

Comcast, he said, plans to install between 1,200 and 1,300 cable modems a week, a range that fits nicely with other MSO's goals.

The final network use will be telephony. AT&T will start in 10 markets late this year with TCI and its MSO partners, including Time Warner and Bresnan, using traditional switched-circuit telephone over HFC networks then changing to Internet Protocol (IP) packetized delivery, standardized through PacketCable, probably in 2000.

Quality of service (QoS) is a key feature of DOCSIS 1.1 cable modems.

"We have to do that to have commercial-grade IP telephony," said Chiddix.

"Our biggest thing this year is to get the markets prepared for it," added Werner, who said that IP telephony is a "someday" proposition for TCI, which will trial the service later this year.

Werner said he does not use the term "circuit switched" to differentiate how traditional telephony services work over HFC networks versus IP.

"Circuit switched means you're switching the calls at a switch some place, which everybody's going to do whether it's IP or it's other," he said.

Instead, he uses the term "constant bit rate."

"Constant bit rate means it's still over cable, but instead of sending it in packets, you're TDM (time division multiplexing) and you've got a constant bit rate for yours that's interleaved with others.

If you're doing straight voice it's very efficient because they talk and, if you're doing it on data and voice, the IP is there. But it's still digital all the way to the home," he said.

Whatever it's called, traditional telephony over HFC has been very successful for MSOs, particularly Cox Communications Inc., Cablevision Systems Corp. and MediaOne.

"We've got a really good product with telephony right now," said Wonsiewicz. "Our systems have amazing unlimited capacity for voice."

That capacity could even be used a little further out for personal communications services (PCS). Cox uses PCS in Southern California with mixed results while Bresnan recently signed up with WirelessNorth LP, a cellular provider to use the MSO's lines in Duluth, Minn.

"We came along with a large amount of spectrum and we could give it to them very easily," said McIntosh.

Bresnan segments its markets into "business nodes" that run off larger, residential nodes.

"In areas where we have opportunities for more advanced data, we will break out from the residential node location and acquire some fibers that have been set aside and create another node, either adjacent to the residential node," he explained. "Or we will extend from the residential node closer to the business area."

This gives the operator deep two-way bandwidth for business users and providers, like WirelessNorth.

"We came along with a large amount of spectrum and we could give it to them very easily without worrying about them grabbing all the residential (bandwidth), so we could be extra generous to them on both the forward and reverse spectrum," said McIntosh.

Bresnan is out in front on PCS as other operators concentrate on the more traditional voice and data services.

"We've done some trials here with it and we're not doing anything of substance on the PCS side over the cable," said Werner. "It doesn't mean that we can't. It doesn't mean that we won't. It's just not on our radar screens."

AT&T might change that.

"That's a fast growing unit and it's one of AT&T's keys and we don't want to telescope what we're up to," said an AT&T source who particularly likes an Ericsson-developed pico (smaller than micro) point of presence technology for wireless PCS.

"They've made a tiny little wireless cellular tower ... that looks like a line amplifier in a cable plant," the source said. It would be "really neat for a cable operator to use Ericsson 'pico' POPs and do the backhaul of the transport for those wireless services like PCS using those same frequencies as are being used to service @Home and Road Runner.

"The antenna would be out on the pole. It would literally look like a line amp," the source said, cautioning, "I'm not asserting here that AT&T's going to do it, although you can infer that if you want."

The system, the source added, "is not rocket science. It's off-the-shelf equipment but now that we have the cable and so do others, that's a very obvious, very good play and I think it bodes very well for the future of us and for other people."

(February 22, 1999)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	CS Docket No.: 97-98
Amendment of Rules	)	
and Policies Governing	)	
Pole Attachments	)	

PETITION FOR RECONSIDERATION

Submitted by:

Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company
Southern Company Services, Inc.

J. Russell Campbell
Andrew W. Tunnell
Jennifer M. Buettner
Balch & Bingham LLP
1710 6th Avenue North
Birmingham, Alabama 35203

Dated: June 16, 2000

TABLE OF CONTENTS

SUMMARY

Southern Company seeks reconsideration of the Commission's Order in *The Matter of Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No., 97-98, ___ FCC Rcd ____, FCC 00-116 (Released April 3, 2000) (the "Order"). Southern Company challenges the Order's inexplicable refusal to recognize the taking of its private property and the numerous court orders entitling it to constitutionally adequate just compensation for the taking.

The Commission relied heavily upon legislative history of the Pole Attachment Act as it existed prior to 1996 ("the 1978 Act"). The Commission also justified its rules and policies by continued reference to a Supreme Court interpretation of the 1978 Act in *FCC v. Florida Power Corporation*, 480 U.S. 245, 107 S. Ct. 1107 (1987). The Commission failed to recognize, however, that the world of pole attachments has changed drastically since the *FPC* case. In 1996, Congress transformed the pole attachment world from one involving regulation of voluntary access to a regime of imposed occupation ("the 1996 Act").

The 1996 Act has been judicially reviewed three times.[1] Each court stated unequivocally that the mandatory access provision found in § 224(f) of the 1996 Act effects a *per se* physical taking of the utilities' private property. Under the Fifth Amendment of the United States Constitution, when private property is taken, just compensation must be paid. The Commission has ignored this constitutional mandate, failing to even mention in the

[1] *See Gulf Power Co. v. United States of America*, 998 F. Supp. 1386 (N.D. Fla. 1998); *affirmed* 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*"); *Gulf Power v. Federal Communication Comm'n*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*").

Order any of the *Gulf Power* decisions or the constitutional requirement of just compensation.

When mandatory access was thrust upon the utilities at the behest of cable and telecommunication companies, it brought with it a new target for the Commission. The old target was reasonable rate regulation. The new target is constitutionally adequate just compensation - i.e., a full and perfect price for the property taken. Getting "close enough" is no longer acceptable. Nevertheless, the Commission has sacrificed accuracy by steadfastly adhering to irrelevant notions of expediency and simplicity. Once private property is taken, the Constitution does not permit such a sacrifice - not even for cable television companies.

For these reasons, the rules and policies set forth in the Order are unreasonable and unconstitutional in the following respects:

(1) The Cable Rate fails to impose upon cable companies an obligation to pay their fair share of the costs for unusable pole space;

(2) The Cable Rate is based upon historical costs instead of current or forward-looking costs;

(3) The Cable Rate fails to allow the utilities to recover all appropriate costs for building and maintaining their networks;

(4) Several of the presumptions underlying the Cable Rate are erroneous and fail to reflect the realities of the utility industry; and

(5) The Conduit Rate fails to reflect the realities of the utility industry and is wholly unreasonable.

The Commission should reconsider the Order and abandon its cable friendly posture. It is time for the Commission to heed *Gulf Power I* and *Gulf Power II* and move toward constitutionally required just compensation.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	**CS Docket No.: 97-98**
Amendment of Rules	)	
and Policies Governing	)	
Pole Attachments	)	

<u>PETITION FOR RECONSIDERATION</u>

Southern Company Services, Inc., through its attorneys, and on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively, "Southern Company"), and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, files this Petition for Reconsideration ("Petition"), concerning the Commission's Order in *The Matter of Amendments of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, ____ FCC Rcd ____, FCC 00-116 (Released April 3, 2000) (the "Order").[2] The Order addresses issues first raised in *Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking*, CS Docket No. 97-98, 12 FCC Rcd 7449 (1997). Southern Company, along with several other utilities, participated in the subject

[2] The Order was published in the Federal Register on May 17, 2000.

proceeding by filing both Comments (docketed June 27, 1997) and Reply Comments (docketed August 11, 1997).[3]

I. Introduction

A. The Pole Attachment World Prior to 1996

The 1978 Act authorized the FCC to regulate rates charged to cable television providers for the use of poles owned by utilities. As the legislative history indicates, one of the purposes of the Act was to foster the deployment and growth of cable television through **low** pole attachment rates. *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. 18 (1977) ("The formula, developed in 1978, gives cable companies a more **favorable rate** for attachment than other telecommunications service providers. The **beneficial rate** to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.") Congress ensured that the rates would be artificially low by allocating the costs of the affected poles solely on the basis of "usable space" and placing on the utility 100% of the cost for "unusable space" that is necessary to support that other portion of the pole. *See* 47 U.S.C. § 224(d). In implementing the rate, the FCC further ensured that the rates were kept artificially low by holding that the rates were to be based only upon utilities' historical, embedded costs (as opposed to using more current or forward-looking, replacement costs).

Utilities generally objected to having their customers subsidize cable expansion through undeniably "favorable" or "beneficial" rates. Utilities complained that the favorable

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[3] Other participating utilities included Tampa Electric Company, Carolina Power & Light Company, Florida Power Corporation, Entergy, Virginia Electric and Power Company, and Pacific Gas and Electric Company.

formula failed to reflect allocation of the total cost of constructing, providing and maintaining utility poles.

In the mid 1980's, Florida Power Corporation ("FPC") voiced its objections by challenging the favorable rate as effecting an unconstitutional taking of its private property pursuant to the Fifth Amendment. The Eleventh Circuit agreed with that position, holding that the 1978 Act committed a taking and failed to provide just compensation, in part due to separation of powers concerns. *See generally Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985). Upon review, the Supreme Court reversed that decision, holding that no taking had occurred because the utilities had **voluntarily** allowed the attachments. *FPC*, 480 U.S. at 250-54. Since there was no taking, constitutional just compensation analysis did not apply. Thus, the rates for the attachments were reviewed under the more flexible notions of reasonable rate regulation and passed muster. The *FPC* court cautioned, however, that should Congress in the future **mandate** access, a taking may occur, invoking the more stringent standards of the Fifth Amendment. 480 U.S. at 251 n. 6.

B. The 1996 Act

In response to continued pressure by cable service providers, Congress again generously accommodated that industry with its 1996 Amendments to the 1978 Act. The 1996 Amendments for the first time **forced** pole owners to grant attachment access to third parties. 47 U.S.C. § 224(f)(1). Congress **required** utilities to provide space to every cable company that desires to use any pole, duct, conduit or right-of-way owned by a utility. In addition, the same right of forced access was also provided to attachments of telecommunications carriers. Utilities, therefore, were stripped of their right to exclude others from their private property.

Congress also provided for a new rate provision for telecommunications carriers and cable companies that also provide telecommunications services. Specifically, Congress held that the Telecom Rate should reflect an allocation not only for the usable space they occupied, but also for the supporting unusable space. 47 U.S.C. § 224(e)(2). Congress declared that the Commission "**shall** . . . recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of **equal benefit** to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments". House Report No. 104-205 at 92 (emphasis added). Yet, Congress left in place the pre-existing "favorable" or "beneficial" rates for cable companies that provided "solely" cable service. 47 U.S.C. § 224(d).[4]

C. *Gulf Power I*

Shortly after its enactment, APCO and other utilities challenged the 1996 Act in the Northern District of Florida. *Gulf Power v. United States,* 998 F. Supp. 1386, 1390 (N.D.

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[4] Cable operators openly acknowledge the favorable treatment they have received from Congress and the FCC. *See, e.g.,* AT&T Annual Report & SEC Filings: Form 10-K at www.att.com/ir/see/10k/10k - 000327.html, pp. 28-29. ("The **favorable pole attachment rates** afforded cable operators under federal law can be increased by utility companies owning the poles during a five year phase-in period beginning in 2001, if the cable operator provides telecommunications service, as well as cable service, over its plant. The FCC has clarified that a cable operator's provision of Internet service does not affect the **favorable pole rates**.") (emphasis added). The Fifth Amendment does not contemplate "favorable" rates for the taking entity. *See, e.g., Edmund Realty Co. v. Walmer Bldg. Co.*, 123 F.2d 54, 56 (8th Cir. 1941) ("any rule that so limits the damages in such case as that the result will be in fact less than just compensation for the injury suffered falls short of the constitutional measure."); *United States v. Virginia Electric and Power Company*, 365 U.S. 624, 636, 81 S. Ct. 784, 792 (1961) ("The value of the easement must be neither enhanced nor diminished by the special need which the Government had for it.")

Fla. 1998). The utility plaintiffs claimed that the 1996 Amendments effected a *per se* physical taking of their private property triggering the requirement of just compensation. The lawsuit also alleged that the 1996 Act was facially infirm in that it violated separation of powers concerns by entrusting just compensation determinations to an administrative agency instead of the courts. *Id.* The utility plaintiffs did not believe Congress or the Commission should be involved in making just compensation determinations.

The district court ruled against APCO and the other plaintiff utilities. While the Court acknowledged that the utilities' property indeed had been taken for purposes of the Fifth Amendment, the Court determined that any complaint about the amount of compensation was not ripe for review. *Id.* at 1395, 1397-98. Given the potential for judicial review, the Court also held that the FCC could initially determine the compensation due for the taking. *Id.* at 1397-98.

Although pleased that a court had recognized the taking of their private property and right to just compensation, APCO and the other utility plaintiffs appealed the district court's separation of powers ruling to the Eleventh Circuit Court of Appeals.[5] A three-judge panel agreed that the mandatory access provision in the 1996 Act effected a *per se* taking of private property. *Gulf Power*, 187 F.3d at 1329. Nevertheless, like the district court, the Eleventh Circuit found the compensation arguments unripe for review and affirmed the lower court's separation of powers ruling. *Id.* at 1338.[6]

[5] The Commission and the United States Justice Department also appealed, challenging the district court's finding that the mandatory access provision effected a taking entitling the utility plaintiffs to just compensation.

[6] During the course of those proceedings, the Department of Justice, on behalf of the Commission and the federal government, informed the Court that utilities who believe that

D. <u>*Gulf Power II*</u>

On February 6, 1998, the Commission promulgated regulations implementing its authority under the 1996 Act. *See* Report and Order, 13 F.C.C.R. 6777, 1998 WL 46987. In the Report and Order, the Commission (1) interpreted the mandatory access provision to require utilities to give Internet service providers access to their poles as a cable service; (2) interpreted the 1996 Act to apply to wireless telephone equipment; (3) determined that the 1996 Act precludes utilities from receiving rent for overlashed wires; and (4) interpreted the 1996 Act to prohibit utilities from receiving additional rent for dark fiber. *See id.* at 6795-96; 6798-99; 6807; 6810.

Southern Company and several other utilities challenged the Commission Report and Order before the Eleventh Circuit in *Gulf Power II*. Among other findings against the Commission, the Court in *Gulf Power II* reiterated the holding in *Gulf Power I* that the mandatory access provision effected a *per se* physical taking of utility private property. *Gulf Power Co. v. United States*, 208 F.3d 1263, 1272 (11th Cir. 2000) (request for reh'g pending). The Court again made clear that the taking of utility property triggered a constitutional right to just compensation. *Id.* However, like the Court in *Gulf Power I*, the Court viewed as unripe any discussion about the appropriate level of compensation. *Id.* at 1273.[7]

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just compensation exceeds the statutory rate(s) should, in the first instance, charge what the utility believes to be appropriate. Letter from Alisa B. Klein (DOJ attorney) to Thomas K. Kahn (Clerk, United States Court of Appeals for the Eleventh Circuit) of 2/26/99. That charge would then be reviewed by the Commission with the right to judicial review of any Commission determination.

[7] In a recent ruling in *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, File No. PA 99-005, the Commission refused to follow the mandates of *Gulf Power II*

II. <u>The Commission Must Abandon Cable Friendly Notions of Simplicity and Reasonable Rate Regulation</u>.

In light of the drastically changed circumstances brought about by the decisions in *Gulf Power I* and *II*, the Commission's Cable and Conduit Rates miss the mark. The Cable and Conduit Rates fail to adequately compensate the utilities for their private property which has been taken for the benefit of cable companies. The Commission seems to have ignored the changed circumstances, instead relying upon two fundamentally flawed assumptions.

First, the Commission relies extensively upon legislative history indicating that with regard to pole attachment rates Congress was concerned with "regulatory complexity, opting for a simple plan requiring a minimum of staff, paperwork and procedures and the avoidance of a large-scale ratemaking proceeding." *Order*, ¶ 7. What the Commission fails to recognize, however, is that Congress' "simple plan" was forever jettisoned when Congress decided to leave the world of "ratemaking" and enter the world of strict constitutional just compensation by taking the private property of the utilities at the behest of cable and telecommunications companies. As such, the Commission's reliance on legislative history concerning the "simple plan" reflected by the 1978 Act is ill-founded.

The Commission also emphasized the Supreme Court's holding in *Florida Power Corp. v. FCC* that its embedded cost methodology was not unreasonable or confiscatory.

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stating that the case was subject to "further litigation." *Id.* at ¶ 7. While the DOJ/FCC, the National Cable Television Association, and WorldCom, Inc., have asked the Court to reconsider its ruling in *Gulf Power II*, *Gulf Power I* is *stare decisis* and binding precedent on the Commission. *Gulf Power II*, 208 F.3d at 1272 (citing *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997)). Whatever relief may be given in *Gulf Power II* pursuant to the pending motions will not change the ruling in *Gulf Power I*, namely that utilities' private property has been taken and just compensation must be provided for that taking.

While the Supreme Court in *FPC* did refuse to find the FCC's rules unconstitutional, it cautioned that it would be a different day if "the FCC in a future case required utilities, over objection, to enter into, review, or refrain from terminating pole attachments agreements." 480 U.S. 245, 251-252, n.6 (1987). That different day is upon us. Consequently, any approval the *FPC* Court gave to a 1978 embedded cost **rate** methodology, is wholly inapplicable to the constitutional **just compensation** analysis required under the 1996 Act. If it were otherwise, the *FPC* Court would never have mentioned the potentially different result a Congressional or Commission mandate would bring. The Court instead would have simply stated, whether it is a taking or not, the **rate** provides **just compensation**.

III. Just Compensation Differs From Rate Regulation

The *FPC* Court cautioned against mandated access because constitutional just compensation is a vastly different concept than rate regulation.

In *United States v. Miller*, the U.S. Supreme Court defined just compensation to mean "the full and perfect equivalent in money of the property taken." 317 U.S. 369, 373 (1942) (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)); *see also Olson v. United States*, 292 U.S. 256, 254-55 (1934) (stating that the government may not appropriate private property unless the "full and exact equivalent for it be returned to the owner"); *see Almota v. Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 471 (1973) (just compensation equals the full monetary equivalent of the property taken). That full and perfect price is to be determined at the time of the taking. *Olson v. United States*, 292 U.S. 246, 255 (1934). The just compensation standard is much higher than the "reasonableness" analysis applied in rate regulation cases that merely seeks to determine if the rate is so low as to be confiscatory.

The distinction between compensation standards and rate regulation was best explained by Judge Tjoflat in the *City Gas* case. *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262, 1314-16 (11th Cir. 1990), *vacated by City Gas Co. of Fla. v. Consolidated Gas Co. of Fla.*, 111 S. Ct. 1300 (1991). In that case, Judge Tjoflat explained that once a taking occurs, once the element of compulsion enters the equation, the court applies a more rigorous standard for just compensation than the broad zone of reasonableness applicable to rate regulation. *Id.* at 1314, n.52 (dissenting opinion). He went on to state that:

> Of course, the just compensation price established by the court under the present facts must satisfy a more stringent standard that the standard that applies to rates set by a regulatory agency.

Id. at 1319.

It is a different day. The world has changed. Gone are simplicity and rate regulation. The change in focus from regulation to full and perfect value means the Commission must abandon notions of reasonable rate regulation and move toward constitutionally adequate just compensation. That distinction is critical and must not be ignored.

IV. <u>The Cable Rate Fails to Provide The Constitutionally Required Full and Perfect Price</u>

Southern Company believes that the Commission is constitutionally required to abandon a cost-based approach altogether and search for the full and perfect price for the property which has been taken. With the proliferation of modern technology and the explosive demand for linear corridors, many unregulated sales of similar facilities are taking place. Unlike an incremental pole by pole cost-based approach, those willing seller/willing buyer sales reflect the value of getting from point A to point B - i.e., the value of the "corridor" or "system."

However, if Southern Company is to be somehow limited to an incremental cost-based methodology as set forth in the 1996 Act, that methodology must be implemented in a fashion that moves much closer to that full and perfect price. The current Cable and Conduit Rates are not even close.

The Cable Rate fails to provide the constitutionally required full and perfect value because, among other deficiencies discussed below, it fails to allow for the recovery of significant costs the utilities incur in building and maintaining the networks to which the cable companies have forced access. In particular, it does not require the cable company to pay for the portion of the unusable space necessary to support its attachments. The Commission also admits that its methodology does not allow for the recovery of all "appropriate" costs incurred by the pole owners as reflected in FERC accounts. *See, e.g.*, Order, ¶¶ 39, 59. Finally, the Commission's emphasis on historical or embedded costs instead of current or forward-looking costs is unreasonable. Thus, under all circumstances, the Cable Rate violates the Fifth Amendment.

A. The Cable Rate Fails to Allow Recovery of All Costs

1. The Cable Rate Fails to Allow an Appropriate Recovery for Unusable Space.

In the 1996 Act, Congress recognized that the unusable space on a pole "is of equal benefit to **all** entities attaching to the pole." House Report No. 104-204 (emphasis added). This is a common sense recognition that the usable part of the pole is not suspended in mid-air. The usable space is available for attachers to take only because of the unusable space buried six feet in the ground and left empty in order to safely provide the usable elevated corridor. In accordance with this recognition, Congress required that the Telecom Rate must incorporate an allocation for unusable space based upon an "equal apportionment" of that space. 47 U.S.C. § 224(e)(2).

While the Telecom Rate appropriately allows for the recovery of such an apportionment of unusable space, the Cable Rate does **not**. Instead, the Cable Rate limits recovery to an allocation based only upon the amount of usable space occupied without taking into account that the unusable space equally supports all attachments on the pole. Since the Cable Rate fails to allow for the recovery of these verifiable and legitimate costs attributable to the taking, it will never provide for the "full and perfect" value of the affected property. Cable companies impose the same costs in terms of unusable space as do telecommunications companies and should pay their fair share.

To demonstrate that the Cable Rate's failure to appropriately allow the recovery of those costs results in a woefully inadequate attachment fee, Southern Company is including in this filing the affidavit of Mr. R.E. Prater. In that affidavit, Mr. Prater, among other things, determines that the Cable Rate for APCO only produces a rate of **$6.50** on an annual basis using FY '98 data while the fully phased-in Telecom Rate produces a rate of **$21.07,**[8] with the only difference between these rates being that the latter rate contains an allocation for unusable space while the former does not. This gross disparity between the Cable Rate and Telecom Rate dramatically demonstrate that the Cable Rate does not provide just compensation because it does not allow for the recovery of all costs associated with the taking.[9]

2. The Cable Rate Fails to Take Into Account All Appropriate FERC Accounts.

In addition, even if the Commission were correct in limiting the recovery of costs to only an allocation for usable space (which it is not), the Commission refused to allow for the recovery of all appropriate costs associated even with that woefully inadequate rate. Southern Company (and the other electric utilities that filed in this proceeding) have previously informed the Commission that at least the following costs booked in FERC accounts should be recognized by the Cable Rate:

FERC Capital Accounts:

360 (Land and Land Rights)
365 (Overhead Conductors and Devices)
368 (Line Transformers)
389-399 (General Plant)

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[8] As noted above, just compensation is measured at the time of the taking. While rate regulation principles may allow a phase-in of rights, constitutional rights cannot be so parceled. Although the Telecom Rate is not at issue in this proceeding, this flaw again illustrates how critical the distinction is between rate regulation concepts and constitutional just compensation standards.

[9] Because the allocation for unusable space will never be $0 (Aff. of Mr. Prater), the Cable Rate fails to provide just compensation in all circumstances, rendering the Order and 47 U.S.C. § 224(d) facially unconstitutional. See U.S. v. Salerno, 481 U.S. 739, 745 (1987).

FERC O/M Accounts:

580 (Operation Supervision and Engineering)
583 (Overhead Line Expenses)
588 (Miscellaneous Distribution Expenses)
590 (Maintenance Supervision and Engineering)
593 (Maintenance of Overhead Lines)
598 (Miscellaneous Distribution Expense)

Where appropriate, Southern Company, along with others, recommended fair allocations.

The Commission rejected the utilities' arguments, instead choosing to cling to cable friendly notions of simplicity and conclusory statements by cable companies that the evidence did not support a change. *See, e.g.*, the Order at footnote 86 and associated text (quoting cable and telecommunications commentators who admit that pole height is increasing yet concluding that there is "no basis" for changing usable space presumptions). For example, the Commission admits that including FERC Account 590 expenses in the formula for determining utilities' maintenance costs would result in a more "appropriate" and "equitable" attachment charge. Yet, the Commission refuses to include these amounts, choosing to do something **in**appropriate and **in**equitable, because doing what is right and fair would be "too complex." *Order*, at 31,273, ¶ 21. This admitted sacrifice of more complete compensation for administrative convenience itself proves that the Cable Rate does not fully compensate utilities for the taking they suffer from forced attachments. *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 631 (1961) (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)) ("The word 'just' in the Firth Amendment evokes ideas of 'fairness' and 'equity'."). The constitution does not allow such sacrifice - - even for cable companies.

The refusal to recognize the other accounts listed above is equally as erroneous and the Commission's explanations for doing so are no better. The Cable Rate will never, under any set of circumstances, achieve just and full compensation. An attachment fee that leaves out expenses actually incurred by a utility that are directly attributable to the function of building, operating, and maintaining the pole distribution networks to which cable companies are attaching, is not a "full and perfect equivalent in money of the property taken."

APCO and Southern Company urge the Commission to review the previous comments concerning the appropriate FERC accounts and reconsider the Cable Rate.

3. <u>The Commission's Presumptions Concerning Pole Height and Usable Space Do Not Square With the Realities of the Utility Industry</u>

In previous comments, Southern Company, along with many other utilities, put overwhelming evidence before the Commission that the current presumptions concerning pole height and usable space were erroneous. Additionally, the attached affidavit of R.E. Prater shows that in 1998, the average pole height for new poles was 40.22 feet. Mr. Prater also explains that 30 foot light poles are not applicable when considering cable and/or telecommunications attachments. When those poles are removed from the calculation, the average pole height increases to 41 feet.

The Commission's current erroneous presumptions favor the Cable companies by relying on pole height and usable space numbers that do not square with the realities of the electric utility industry. The Commission has offered no reasoned explanation for rejecting the utilities' evidence and the Order should be reconsidered.

B. The Cable Rate Should, at a Minimum, Be Based Upon Current Forward Looking Replacement Costs.

1. Use of Embedded Cost Does Not Provide Just Compensation

Long-standing judicial precedent teaches that the use of embedded costs is not appropriate in determining just compensation.

In most instances, just compensation is the "fair market" value of the affected property. *Miller v. United States*, 317 U.S. 369, 374 (1942). That is, courts will look to determine what a willing buyer and a willing seller would agree to as a price. *Id.* Market value is not an appropriate measure of just compensation when the property's value is too difficult to determine or when it is rarely, if ever, sold on the market. *United States v. 564.54 Acres of Land in Monroe and Pike Counties, Penn.*, 441 U.S. 506, 512 (1979) (noting that public facilities such as roads or sewers are examples of properties for which market value is difficult or impossible to determine); The Appraisal Institute, *The Appraisal of Real Estate*, 338 (11ed. 1996) ("*Appraisal*"). In these cases, courts apply other measures of value to ensure the compensation meets the constitutional standard. *United States v. Toronto, Hamilton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949).

These various "market value" proxies include, without limitation: Replacement Cost, Reproduction Cost, Income Approach, and Substitute Facilities Doctrine. 8 *Nichols on Eminent Domain*, §§ 14A.01-14A.09.

Among the various alternatives, however, the "original cost of the property is generally rejected as a past measure that is unreliable in determining a current fair market value." 8A *Nichols* § 20.01; *see also United States v. Toronto, Hamilton, & Buffalo*

Navigation Co., 338 U.S. 396, 403 (1949) (discussed above). Yet, this least favored "original" cost - or embedded cost - methodology remains the basis of the Cable Rate.

The embedded cost approach is disfavored for a reason. The Court in *U.S. v. Toronto* explained that "original cost is well termed 'the false standard of the past,' where, as here, present market value in no way reflects that cost." *Toronto*, 338 U.S. at 403 (citations omitted). Here, measuring the value of a pole system on the basis of original cost will not achieve just compensation, or anything remotely close thereto. The cost of materials, labor, easements, placement, etc. is far greater today than it was at the time the system was constructed. The market value of the pole system is far greater than the historical cost of the system. Demand for the utility corridors has increased dramatically over the years and will continue to be a sought after property. The value of these linear corridors in the modern technological era bears absolutely no relation to the original cost of a single pole. The Commission has offered no reasonable explanation to the contrary.

Instead, even members of the Commission recognize that embedded or historic costs do not advance Congress's goals in enacting the 1996 Act. One member of the Commission explained that forward-looking, or replacement, cost is the proper measure on which to base the prices new entrants into the telecom market must pay to incumbents to purchase unbundled elements of the incumbent's network. In a speech extolling the procompetitive policy of the 1996 Act, then Commission Chairman Reed Hundt championed the mandate that these prices must be based on "forward-looking costs." Reed Hundt, Speech before the FCC Business Development Associates, Antitrust

Conference for Corporate General Counsels, 1996 FCC LEXIS 5935 (Oct. 22, 1996). Mr. Hundt insisted that:

> [t]o be pro-competition these 'cost-based' prices must be based on forward-looking cost. When the incumbent in a competitive market contemplates expanding or rebuilding or selling or generating a retail price for a customer using its network, it is forward-looking cost that it considers: thus only forward-looking cost gives the new entrant the same opportunities from the existing network that the incumbent gets.
>
> Indeed, sound business decisions, by competitive and monopolistic firms alike, are based on forward-looking costs, so it is in terms of forward-looking costs that the playing field must be leveled.
>
> Moreover, only prices based on forward-looking costs can prevent incentives for arbitrages retail prices become more competitive. It's true that Congress gave entrants the right to choose which unbundled elements to take from the incumbent. And it's also true that the value of network elements can fluctuate. But that is a policy problem only if the price for the network elements is based on historic cost.
>
> If the price the entrant must pay is economic user cost with economic depreciation, based on forward-looking, or replacement cost–i.e., reflects current market value–then the incumbent doesn't get left holding the bag. It gets paid enough to continue to invest in, to maintain, to operate, to profit reasonably from, its network. Lease prices for elements based on historic cost pricing do not provide such guarantees . . . ."

Id. This call for prices that are based on present-day costs refers to provisions of the same Act in which the pole attachment statute is contained. Consistency demands that the same pricing methodology be applied throughout the Act. Admittedly, the prospective attaching entities are not the pole owners' competitors in providing electric services, but the same procompetitive concerns mandate forward-looking or replacement costs in this setting as well.

It would be patently unfair to conclude that the past value of property constitutes a "full and perfect monetary equivalent" of the present value of the same property. No willing seller would freely and voluntarily sell his property at the price he paid to obtain it. Rather, he would sell it at the current, present-day price he could get for it in the market. *Appraisal*, at 20-26. For this reason, a valuation method based on backward-looking, historical, embedded costs does not derive a fair and equitable award, and could never be the measure of just compensation. Original cost would not make a property owner whole because it is not a reflection of the value of the property at the time of the taking.

The Commission must adjust its thinking to come in line with the constitutionally mandated realities of the 1996 Act. If a cost-based formula must be the tool the Commission employs, it must be based on current or forward-looking replacement costs.

2. The Replacement Cost Proxy

As stated above, Southern Company does not believe a cost-based system will ever achieve the full and perfect price for its property. However, if limited to a cost-based framework, a current or forward-looking replacement cost methodology is a more appropriate proxy.

Courts have also used the replacement cost valuation method to determine the value of special purpose property. *Massachusetts-American Water Co. v. Grafton Water District*, 631 N.E.2d 59, 61 (Mass. App. Ct. 1994).[10] Water supply facilities were considered special purpose property for which the condemnee in *Massachusetts-American* was entitled to recover the amount necessary to replace them. *Id.* The court justified its

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[10] Special purpose property is that which is used to provide a unique service and is not regularly bought and sold.

holding on the fact that there was no evidence of comparable sales, the property was used for a unique purpose, and it was of a type not frequently bought and sold. *Id.* at 60, 61. Similarly, it cannot be disputed that utility poles are special purpose property, and can be accurately valued under the replacement cost methodology.

In its *Local Competition Order*, the Commission sided with cable companies to hold that utilities were not automatically entitled to deny a request for access on the grounds that its poles lacked the capacity to accommodate any more attachments. 11 FCC Rcd. 15,499, ¶¶ 1161-1164.[11] It based its holding on the fact that because a utility has the ability to expand capacity for its own needs, § 224(f)(1) requires it to expand capacity to meet the needs of attaching entities. *Id.* at ¶ 1162. According to the FCC, even if expanding capacity means the utility must replace poles and add conduits, it must go to these costly measures to satisfy its duty under the statute.

Although obviously designed to again benefit the cable companies, the Commission's erroneous interpretation of the Act actually provides additional support for the utilities' argument that replacement cost must be the basis of valuing the pole system. If, as a result of the governmental taking, the utilities are required to replace elements of the system in order to satisfy their statutory duty, the Fifth Amendment demands it be compensated according to the costs it expends in replacing these assets. Again, just compensation requires the utilities receive the "the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1942).

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[11] The Commission's cable friendly interpretation of the statute obviously ignores the safe harbor provision in § 224(f)(2).

V. APCO's Replacement Cost Price Reveals the Deficiencies in the Cable Rate

In *Gulf Power I* and *Gulf Power II*, the Eleventh Circuit Court of Appeals told utilities they were entitled to constitutionally adequate just compensation. 187 F.3d at 1329; 208 F.3d at 1272. During the proceedings in *Gulf Power I*, the Justice Department explained to the Court in writing that utilities should determine what they feel is adequate compensation. APCO has followed the *Gulf Power I* and *Gulf Power II* decisions and the Justice Department's recommendation and has arrived at an annual price for pole attachments based upon a replacement cost methodology. As demonstrated in Mr. Prater's affidavit, the annual attachment price for both cable and telecommunications carriers using FY '98 data would be **$38.80** per pole.

APCO's price, which only begins to move toward the just compensation to which it is constitutionally entitled, is based on a gross pole investment price arising from the replacement cost of the pole at current prices. APCO's methodology also includes all proper FERC accounts. Finally, APCO's methodology fully allocates the cost of both usable and unusable space to all attaching entities - - including cable companies.

Applying the Commission's Cable Rate, APCO would receive only **$6.50** per pole on an annual basis. Yet, for a telecommunications attachment, applying the fully phased-in Telecom Rate, APCO would receive **$21.07**. The gross disparity between the replacement cost price and the Cable Rate (i.e. **$32.30** per pole) is telling. The Commission has fallen well short of just compensation. The statutory difference between the Cable and Telecom Rates to which APCO would be entitled under the Commission's rules (i.e. **$14.57**) is further proof that just compensation for cable attachments will not been received. The

Commission should reconsider the Order, abandon its inapplicable notions of simplicity and rate regulation, and move toward constitutional required just compensation.

VI. The Conduit Rate Is Flawed

For the reasons set forth in Southern Company's previous comments and its reply comments in this proceeding, the Conduit Rate is fundamentally flawed. The Commission has offered no reasoned basis, supported by evidence, for its approach. The Commission should reconsider the Conduit Rate.

VII. Arbitrary and Capricious

In its Order, the FCC acted arbitrarily in issuing a rule that rejects accuracy, appropriateness, and equity in favor of simplicity. Absent any record evidence that the Commission's decision was the product of reasoned decision making, a reviewing court will be forced to "undo its action." *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir.1994) (reversing an FCC rule because the court was "unpersuaded that the Commission has given due weight to factors bearing sharply on the wisdom or fairness" of its rule).

"Administrative convenience" is not a reasonable basis upon which the FCC may justify a decision. *See, e.g., Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 173-74 (D.C. Cir. 1995) (en banc) (setting aside FCC rule because agency acted arbitrarily and capriciously in relying on "administrative burden" to justify its decision where there was no evidence of a burden and the rule afforded regulated entities no viable way to recover their costs); *Illinois Public Television Ass'n v. FCC*, 117 F.3d 555, 565 (D.C. Cir. 1997), *clarified in*, 123 F.3d 693 (D.C. Cir. 1997) (setting aside an arbitrarily and capriciously made FCC rule because its "administrative convenience" rationale was unsupported and because the rule sacrificed equal treatment of regulated entities for convenience).

Conclusion

For the foregoing reasons, the Commission should reconsider the Order so as to prevent the unconstitutional taking of Southern Company's property and to otherwise bring the Order into compliance with applicable legal requirements.

Respectfully submitted,

One of the Attorneys for Southern Company Services, Inc.

OF COUNSEL:

J. Russell Campbell
Andrew W. Tunnell
Jennifer M. Buettner
Balch & Bingham LLP
P.O. Box 306
Birmingham, Alabama 35201
(205) 251-8100

STATE OF GEORGIA

FULTON COUNTY

AFFIDAVIT OF HENRY J. WISE, MAI

Before me, personally appeared Henry J. Wise, who being known to me and deposes on oath and states as follows: My name is Henry Joseph Wise. I am over the age of nineteen years. All of the statements in this affidavit are true based upon my personal knowledge and based upon information compiled for my review in preparing this affidavit. This affidavit is submitted in support of Gulf Power Company's Response to Complaint in P.A. No. 00-004.

I. BACKGROUND

This proceeding involves determining an appropriate charge for pole attachments by cable companies to the overhead distribution facilities of Gulf Power Company (GULF). It is my understanding that GULF is required by law to provide access to its facilities to both cable companies and competitive local exchange carriers, or CLECs, that provide wire-based services (collectively referred to as Jurisdictional Attachers). In addition, it is my understanding that judicial precedent establishes that GULF is entitled to just compensation (market value) in return for that access. The purpose of my affidavit is to make a determination of just compensation (market value) for that property using standard appraisal techniques.

The electric utilities' system of poles and/or ducts constitute a corridor or network whereby numerous discrete locations are joined together to provide a continuous flow between end points. The corridor is owned by the power company and shared by the other companies that attach to the pole and/or duct, thus creating their own corridor or network within a shared corridor or network. When GULF's system of poles is seen this way, other corridors come to mind that are also shared.

Railroads, public transit systems, communication towers and others that have shared corridors may be useful as comparable situations, or analogues, in this study. Frequently in real estate appraisal when several parcels are combined into a larger parcel with an increased usefulness over the individual parcels, an increment of value results which is called "assemblage value", "plottage value" or "enhancement value".

II. PRESENT INDUSTRY STRUCTURE

Electric power is available to users through investor owned companies, municipally owned companies (MUNI's), and customer-owned Electric Membership Co-operatives (EMCs). In five southeastern states (Georgia, Florida, North and South Carolina, and Tennessee), there are 239 municipally-owned electric companies, 152 electric cooperatives and 17 investor-owned power companies. These companies serve more than 21.2 million residential customers. Investor-owned companies supply electricity to approximately 60 percent of these residential customers.[1] The generation of power is frequently separated from its distribution and provided by an industry cooperative or trade association. While the investor-owned power companies are regulated by the state public service commissions as to electric rates, the EMCs and MUNI's generally are not.

It is my understanding that pole attachments and duct/conduit sharing, once voluntary, is now mandated by The Telecommunications Act of 1996. Pursuant to that Act and to the implementing regulations of the Federal Communications Commission (FCC), if the parties do not agree to a pole attachment rental rate, then the FCC assigns a formula for computing the rental rate. One of the problems with the FCC approach from the point of view of an appraiser considering market value is that the formula is an embedded cost recovery formula that relies upon the uniform system of accounts established by the Federal Energy Regulatory Commission (FERC) of the United States Department of Energy. Even though they are not regulated, the MUNI's and EMCs set pole attachment rental rates following the lead of the larger investor owned companies, frequently with the services of rate consulting companies. There is anecdotal evidence from interviews as well as written legal or state Public Service Commission (PSC) decisions that indicates this lead-following stems from a fear of non-conformance with the FCC and the norm. EMCs varying from this norm seem to believe that they may invite scrutiny and open themselves to rate disputes with which they are ill-equipped to deal.

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[1] Pritchett, Ball and Wise, Inc. based upon information contained in www.eia.doe.gov/cneaf/electricity/esr/t14.txt downloaded May 5, 2000.

While many co-ops seem to follow the FCC methodology, an EMC in Georgia aspires to return to a system used in the 1950s and 1960s called "Share the Savings."[2] The working of this system can be illustrated by the following. Assume a pole costs its owner $80 to "set" or physically place in the ground. When the present cost basis to rent an attachment is $12.50, there is a cost saving of $67.50 ($80 less $12.50 = $67.50), and the EMC seeks to participate in this cost savings. Some alternatives to "Share the Savings" include a percent of revenue or a share of profits. There is evidence that some state regulatory authorities are beginning to consider this concept. A Michigan PSC commissioner recorded a dissenting opinion in 1997 to the "artificially low attachment rate." He stated that the rate arrived upon was made "without considering the avoided cost, the actual cost to an attaching party of constructing and operating its own poles."

Electric utilities and the telephone companies each own and share poles and ducts. They negotiate Joint Use Agreements to provide for a payment for the net use differential. It is interesting to note that for the three agreements GULF negotiated with Bell South Telecommunications, Inc., Sprint-Florida, Incorporated and GTC, Inc., the annual rental rate for an attachment varied from a low of $21.97/pole plus 100% of "make ready" and 45% of liability to a high of $58.84/pole. The rates varied with the different companies based on the extent to which each of the companies wished to maintain parity in pole ownership with the power company. The issues associated with parity included the cost

[2] Gary Miller, CEO, Greystone EMC, Douglasville; formerly known as Douglas County EMC.

of "make ready", liability and other costs of ownership. These are rates that are not directly regulated by any governmental agency, but these negotiations are by regulated industries that have been historically rooted in embedded cost-based methodologies for allocating the cost of the affected poles. It is also generally understood by the parties that the right of access to the other party's poles constitutes additional consideration above the expressed rate. There is no such *quid pro quo* for attachments by the Jurisdictional Attachers. The Joint Use Agreements constitute a move towards a negotiated rental rate as contrasted to a regulatory rental rate.

<u>Research Process Limitations</u>.

It is difficult to induce spokespeople for the local electric companies and telephone companies to fully share information about their pole attachment and conduit rental rates for several reasons. Many of them are locked in negotiations with each other for renewal of these agreements and they are understandably reluctant to reveal sensitive information and others expressed various legal concerns about sharing information with us.

III. THE RAILROAD INDUSTRY LITERATURE

Of all the corridor users, railroads are one of the oldest, and the valuation of corridors and rights of way for railroad users has a literature that may be useful for the current discussion.[3] It is also interesting that the railroads, now a mature industry, went through a period of deregulation and rebirth in the 1970's and were treated with special accounting techniques, (such as liquidation-value appraising) somewhat in the manner of special costing methods for the owners of poles at the present. Some of the points of discussion in the railroad appraisal literature are:

1. A "corridor assemblage factor" is a measure of value added to the Across The Fence (ATF) valuation of land based on the extra costs of acquisition.[4]

2. "Assemblage" is defined as the combining of two or more parcels, usually but not necessarily contiguous, into one ownership or use. See also plottage.[5]

[3]This discussion draws from George R. Karvel, "Public Utility Easements in Railroad Right-of-ways," *The Appraisal Journal*, January 1989; Clifford A. Zoll, MAI, "Rail Corridor Markets and Sale Factors," *The Appraisal Journal*, October, 1991; and Frederick D. Miltenberger, MAI, "Rail Right-of-Way Valuation," *The Appraisal Journal*, January, 1992.

[4]The "across the fence method" is a means of estimating the price or value of land adjacent to or "across the fence" from a railroad, pipeline, highway, or other corridor real estate; as distinguished from valuing the right-of-way as a separate entity. Appraisal Institute, *The Dictionary of Real Estate Appraisal*, Second Edition, page 5.

[5]Appraisal Institute, *The Dictionary of Real Estate Appraisal*, page 18.

3. A corridor enhancement factor is a measure of the value observed upon sale, of an existing corridor, compared to its ATF value.

4. Approaches to appraisal may include measures of value in use, net liquidation value, ATF values, and value to private right-of-way users, and the selection is a function of the appraiser's highest and best use analysis (H&BU).[6] [7]

5. Zoll researched corridor sales to compute an "acquisition factor," or the ratio of average per acre sale/purchase price divided by average ATF per acre unit price. For 12 sales where the motive was continued corridor use, he calculated an average factor of 1.52 with a low of 0.73 and a high ratio of 3.34. His work is seen by some, notably Miltenberger, as evidence of "enhancement value."[8]

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[6]When the taking utility does not preclude partial operation of the railroad, the highest and best use may be to sell the excess right of way to abutting owners, developers, or other users. The valuation approach taken is then the Net Liquidation Approach, using ATF prices, with the value of the easement indicated by the difference between before and after values.

[7]When the railroad can maintain undiminished operations, the H&BU may be as a transportation-communications corridor. "The measures of value must be found in actual sales or rental of existing corridors to other users."

[8]One of the earliest citations for enhancement value was George R. Bettle, "Railway Right-of-Way Use and Economic Value," The Appraisal Journal, October, 1977.

6. Miltenberger reviews his experience and reports corridor enhancement factors of

   a. 1.93 (for a 1989 railroad sale of an agricultural right-of-way to a pipeline company)

   b. 3.8 (for a 1986 sale by a railroad to a power company in northeast Indiana)

   c. with other examples of enhancement value where the ratio was not calculated.

7. Rahn writes that the "enhancement factor" is also called the railroad factor, synergism factor, corridor factor, and continuity factor. He makes a case that it is an inherent characteristic of a transportation corridor, much like size and location and compares it to "plottage," the increment of value created when two or more sites are combined to produce greater utility.[9]

8. Rahn recounts the stories of a state that paid a plottage premium of 27% over the ATF value to acquire a corridor for commuter rail use under normal market value type conditions; and another purchase by that same state for a price 11% more than the ATF value.[10]

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[9] Arthur G Rahn, "Notes and Issues" The Enhancement Factor in Transportation Corridor Sales and Appraisals", *The Appraisal Journal*, January 1999. For "Plottage" see Appraisal Institute, The Dictionary of Real Estate Appraisal, 3rd Edition, page 269.

[10] Rahn, ibid.

IV. ANALOGUES

Besides the electric power industry, shared corridors are also used in telecommunications, railroads, wireless transmission towers, cable television systems, highway and tunnel systems, and mass transit systems. Many of these industries are characterized by vigorous competition and service/product innovation. Active markets exist where various kinds of tenants need to share a corridor to provide service at minimal costs while a variety of facilities are available from which those tenants can choose. Tenants include cable television, land-wire telephone, cellular telephone, PCS telephone, satellite, pager, and private transmissions. Thus, the tenants provide the demand, and the supply consists of poles, ducts, conduits, rooftop antennae, transmission towers, rail and transit right-of-way, and others. We studies these industries and learned the following:

Railroads

The Norfolk Southern and CSX operate on approximately three-fourths of the track in the southeast, while the regional and local railroads (short lines) including switching and terminal railroads operate on the remaining track. Buried cable and pole line companies negotiate for use of these railroad rights-of-way parallel to the tracks. Gas pipelines and water and sewer lines in addition to cable and aerial power lines negotiate for right-of-way crossings. Numerous leases exist with widely varying terms, although rates are stated generally in terms of rent per linear foot. These rates may range from $.08 to $.10

per linear foot, say $475/mile in rural areas to $5.00 per linear foot or $26,400/mile in more urbanized areas. The average distance between power poles is 250', or 21 poles/mile. To the extent that use of the railroad right-of-way is directly equivalent to power poles, the rent equivalency in a rural area at 21 poles/mile is $23/pole and in an urban area it is $1,257/pole.

Norfolk Southern operates a reported 22,000 route miles.[11] Telecommunication and cable companies lease rights-of-way along approximately one-third of these miles. Lease terms run generally from 15 to 20 years with five-year to 10-year renewal options. Rates most recently range from a low $.50 per $1.00 per linear foot for rural land to a high of $10 per linear foot in most desirable urban locations. A "typical" lease falls closer to the middle of the range, closer to the $5 per linear foot described above.

One rail line prefers a one-time payment rather than servicing monthly rents and re-negotiating leases periodically. The one-time payment is calculated at eight times annual market rent. This multiple implies a 12.5 percent land rent rate, a rate that coincides with a Florida rail line that leases sites for regeneration stations along a fiber optic line at 12.5 percent of the railroad's land cost.

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[11]Mick Moorman, Principal, Thoroughbred Technology and Communications, a company that negotiations right-of-way for Norfolk and Southern Railroad; telephone conversation, June 1, 2000.

Wireless Transmission Towers

Comcast Communications Inc. is a cable company that owns 231 cellular communications towers. They have owned the towers for an extended period and most towers are 10 to 35 years old. Comcast uses the towers to transmit their television signals and markets excess space on the towers to other users. Attaching entities are usually large users like Powertel Paging, but may be small local users like a taxicab operator or any company that uses paging or wireless communications. The typical market range for cell tower lease rates is $1,500 to $1,800 per month, or $18,000 to $21,600 annually. This is for "typical" or standard towers, those not in dense urban areas or in very rural areas. Lease rates can be up to $2,500 monthly if many users are vying for limited space.

While some towers have no other users interested in attaching to it, some towers have several interested attaching entities. For example, Comcast is constructing larger replacement towers to accommodate attaching entities. One existing tower is being replaced at a cost of about $75,000. Comcast will spend about $60,000 and an attacher will pay the balance, with some rent abatements on its lease rate for a few years. Lease income will repay Comcast's investment in about 3.5 years. Comcast's decision rule is to recover all tower costs in 5 years or less. While the monthly dollar rate is not directly comparable to the rate for pole and conduit attachments, the payback decision rule is a reasonable analogue.

This active, unregulated market is characterized by informed tenants. Most attachers, (even small users like taxi companies) are aware that general market rates for attachments fall in the $1,500 to $1,800 per month range. Rates for attaching entities are set based on the tower company's revenue-maximization goals, while acknowledging that a competitive market exists for attaching entities. Maximum rent from the standpoint of the attaching entities is a function of a) the number of alternative tower choices and b) the cost to create their own tower, on which they may rent out space.

Airtouch Cellular (now known as Verizon Wireless) once owned towers but sold them and is now a tenant on 150 towers. The rates are negotiated and depend on how much equipment they need to install at a location, the population around the site, adequacy of power back up, height of the site and height of the tower itself. They find numerous alternatives in their markets and have even attached a telecommunications dish to a house.

Skytel Pagers currently has 7,000 locations across the US and puts their receivers and transmitters on roofs, towers, water towers and church steeples. As they negotiate to renew their leases they seek the lowest rate possible, and negotiate against a nationwide data base of rental experience. Currently they are paying from $50 to $2,000 per month per receiver and more for transmitters. One spokeswomen said that choosing locations and setting rent is more art than science (which is similar to the position of most bargainers in a free and open marketplace).

Some attachers require only one tower, while others, such as a cellular telephone company, need a series of towers or a "corridor" or "cluster." The "corridor user" is generating demand for the consolidation of towers by assemblers. This may be a sign of plottage or assemblage value being created by having several towers forming into a network. Companies who are active in this are American Tower Company and Pinnacle Tower Company.

Highway And Tunnel Systems

There are many recent examples of sharing arrangements for transportation corridors. Few of them are simple arrangements that suggest a pole attachment rental rate or even a conduit rate per linear foot. Most are partnerships between a corridor owner and one or more users, or even a "wholesaler" who will broker relationships with multiple users. Sometimes rent is paid to the corridor owner, but often they also receive the benefit of substantial communications facilities at little or no installation expense. These are interesting analogues because they indicate that symbiotic relationships are possible, demand is high for access rights for fast-evolving technology, and these partnership relationships are freely negotiated in an open market. Recovery of investment costs is seldom a relevant or adequate basis for rental rates. Many times the corridor owner does not bear any marginal costs, yet they still strive for an income stream for their stakeholders to recognize the value created by the relationship. A few illustrations follow.

Adesta Communications (former MFS Network Technologies) negotiated an agreement with the New York State Throughway Authority (NYSTA) to use the NYSTA right-of-way to install conduits for communications lines. This partnership agreement grants the NYSTA (at no cost of installation) the shared use of the fiber optic communications system for NYSTA's own use, and provides a source of revenue from a participation in the leasing revenues. The NYSTA will get one third of the revenue Adesta collects from leasing capacity on the communications system conduits.

For example, in 1999 Adesta signed a contract with Williams Communications to lease capacity on a 542-mile line. An Adesta Communications company press release, which was verified with NYSTA, states that $25.7 million was paid for the 20-year lease. This equates to $1.285 million per year and $0.45 per linear foot per year. NYSTA's participation is approximately $0.15 per linear foot. The cost of the lines and equipment was incurred by Adesta. Adesta's investment includes labor and capital in the system, and it receives a two-thirds share of all leases it negotiates.

According to a representative with the NYSTA, the agreement between Adesta and the Authority was negotiated in 1995, at which time the demand for fiber optics was not as high as it is today. Adesta is one of the pioneers in the area of sharing right-of-way, communications lines, and sub-leasing profits with public entities.

At the inception of their "partnership" with Adesta, the NYSTA hired an economic consulting firm to study the market on similar rates to assist it on a determination of reasonable market rates to which they would to agree with Adesta. The Thruway Authority's perspective did not include cost-based rates, as it had no capital investment in the project. NYSTA wanted a market rate that was sufficient for it to allow the potential inconvenience and risk of having users on its right-of-way. NYSTA concluded that it was not interested in "leasing" right-of-way for "just a share of the costs." The arrangement must be worth the expense of review and analysis of the deal, and worth the risk of compromising one's network.

Adesta Communications reports that it considers costs, payback periods, and rates of return when determining its asking rates for space on conduits, but declined to divulge any specific amounts due to the competitive nature of the industry. It also states in an October 1998 press release that "with fiber optic networks spreading throughout the world at an unprecedented pace, rights-of-way and conduit capacity are becoming precious commodities."

Adesta has used this same concept in various parts of the country, including the Chicago Transit Authority, Illinois Tollway Authority, Bay Area Rapid Transit (BART) in

California, and numerous projects in Colorado. BART Telecommunications Revenue Program project manager states that BART was operational for two years and that "leasing conduit capacity has generated $2.3 million in annual recurring BART user fees and $11.8 million in up-front payments." Lodestar Towers, Inc. has worked out a deal with the Florida Department of Transportation for exclusive use of right-of-way to build towers. An April 8, 1999, press release by Adesta Communications states that it has been contracted to build a high-speed network in Colorado, providing connectivity to several "off right-of-way" locations for the Colorado DOT. This will augment the available network to 1,200 miles, "representing a total potential value to MFSNT (Adesta) of more than $150 million."

It is interesting to note in the above illustrations that, as some of the constructors in the corridors act as brokers between owners and users, one way to set mutually agreeable, economically efficient rates is to institutionalize the use of these brokers or even to privatize the process of corridor sharing.

Mass Transit Systems

There are several examples of freely negotiated corridor sharing arrangements for conduit and ducts. The Metropolitan Atlanta Rapid Transit Authority (MARTA) recently entered into two leases with MCI Telephone for about 28 miles of right-of-way. The term will be for twenty years with two five-year options; the rental rate is $3.30 per foot in one of the leases and $3.92 in the other. MCI will enjoy rent abatement for the first year in exchange for installing cable for MARTA. The rental rate resulted from a request for proposals issued by MARTA when they discovered that they had one empty duct across the system. MARTA also owns land that they have leased to tower operators. With an area of about 200 to 300 square feet each, four sites bring between $25,000 and $30,000 annually from companies who erect the towers.

An article of note appearing in the May 29, 2000, issue of the "Atlanta Journal/Constitution" reports how public rights-of-way in various parts of the metropolitan area are running out of space. This scarcity drives up rents. Because right-of-way is so much in demand in urban areas, mass transit right-of-way is valuable to fiber optics and telecommunications users. Among the transit systems we surveyed, conduit with multiple inner ducts are laid throughout much of the heavy track system. The transit systems make accommodation to the conduit lessee in return for inner duct use. Despite this accommodation, rental rates per linear foot for cable are high within the most densely populated urbanized area ($6.40 per year per cable in one city). Rents per linear foot decrease as one moves outward from the central core to $1.65 per linear foot as one reaches the edge of urban development.

V. A REAL ESTATE APPRAISAL ANALYSIS

Valuations of real estate, whether for market value of the ownership interests or fair market rental rate estimation typically use three independent but related approaches. The Depreciated Replacement Cost Approach is based upon the concept that the value of an interest in property tends to be limited to the value of the land (as determined by the Sales Comparison Approach) plus the cost to replace the improvements, less accrued depreciation, plus entrepreneurial profit. The Sales Comparison Approach compares the property to recent transactions of similar interests in order to infer the motivations and decision rules. The Income Capitalization Approach analyzes and quantifies the income producing capabilities of the property interest in view of current economic conditions and investor return requirements. As a final step, the value estimates from each of the approaches are reconciled after considering how well they capture actual market activity and the relative strengths and weaknesses of the data. We have observed and inferred rental terms in a market comparison approach, estimated depreciated replacement costs as a basis for rental and value, and considered how (at least in some instances) investors have negotiated the split of revenue streams in the sharing of these corridors. In all approaches our purpose was to estimate the fair market rental rate.

The Depreciated Replacement Cost

The formula I employed was as follows: Investment x Carrying Charge Rate x Pole Space Allocation. The following determines the valuation of each of these components based upon a depreciated replacement cost basis (as opposed to the FCC's embedded cost methodology).

A. Determining the Amount of Investment

Real estate appraisal theory holds that buyer and seller (or tenant/landlord) would consider the current replacement or reproduction cost in their decision making (as opposed to historical costs). We have estimated the Replacement Costs based on current cost experience of the client, as demonstrated in the Third Affidavit of Mr. Michael R. Dunn. Similarly, land value is taken from client records. We would have preferred to use current land market values, but they were not available, and the cost to appraise the present market values for the land would be prohibitive. Another complication is that there is a substantial amount of land not owned by the power company but used under terms of easements or other agreements.

Consistent with appraisal theory, we have also assigned a 15% entrepreneurial incentive to reflect that no improvements will be produced unless the source of capital sees a reward for taking the risk.

According to accepted appraisal theory, market participants (including renters and owners) consider actual experience-based depreciation more useful than accounting conventions. Working from our estimate of Replacement Costs, we have used the client's expert study of economic depreciation of a pole to establish remaining economic life and accrued depreciation. According to the study, the average service life of a pole was concluded to be 32 years with an average remaining life of 24 years, indicating an average accrued total depreciation of 25 percent (1-24/32 = .25).[12]

Subtracting our estimate of Accrued Depreciation from Replacement Cost New produces our estimate of Depreciated Replacement Cost New. We then applied a Corridor Enhancement Factor to recognize the aggregation value, or plottage effect, of combining a series of single poles into a series that can conduct commerce between two points. Referring to the railroad literature, we determined that a 30% enhancement factor is appropriate.

[12]See Third Affidavit of Mr. Michael R. Dunn.

B. Carrying Charge Rate

The FCC methodology for determining rates for Jurisdictional Attachers includes a component, referred to as the Carrying Charge Rate, which is applied against the investment item in order to calculate an annual rent for the Jurisdictional Attacher. For GULF, the FCC methodology produces a carrying charge rate of 33.945%. This approved rate includes [redacted] for depreciation, [redacted] administration, [redacted] for maintenance, [redacted] for taxes, and 7.757% for investor return.[13] The only change that I made to the FCC sanctioned carrying charge rate for GULF is to remove the accounting based depreciation from the rate and to directly address accumulated economic depreciation in the calculation of the depreciated replacement cost new. We replaced the accounting depreciation with a lower rate (1.55%) indicated by Sinking Fund Factor methodology. This sinking fund is the fraction of each dollar to be invested annually at the approved return of 0.0757 sufficient to return one dollar of invested capital in the pole over the 24 years remaining economic life of the pole. This is a more reasonable assumption than to ignore the time value of money, which is the consequence of straight-line depreciation used in accounting.

[13] Gulf Power Company Calculations using FERC Form No. 1 data utilizing FCC methodology as described in CC Docket No. 86-212, Order No. FCC 87-1209, as of December 31, 1999.

C. Pole Space Allocation

The FCC's pole attachment rental rate formula presently approved by the FCC allocates costs of installation and operation and maintenance based on the assumption that the typical pole is a 37.5-foot tall pole. This 37.5-foot long pole is further assumed to have 6 feet below grade, an eighteen-foot clearance above the grade and thirteen and one half feet of usable attachment space above that. The electric power lines are mounted near the top of the pole. There is a forty-inch safety zone below the power lines, leaving a communication zone for telecommunications lines and television cable below the safety zone. The Jurisdictional Attachers are assumed to occupy one foot of usable space.

As discussed in the Third Affidavit of Mr. Michael R. Dunn being filed contemporaneously herewith, GULF does not use 37.5 foot poles, and the use of a 40-foot distribution pole is much more representative of the typical pole used in GULF's system. In addition, and also as discussed in Mr. Michael R. Dunn's Affidavit, the appropriate amount of usable space to be used is 11.50 feet and includes 7.50 feet allocated to Gulf Power 3.00 feet for an ILEC user, and 1.00 foot for the Jurisdictional Attacher. Usable space occupies 28.75 percent of the pole (11.50 feet divided by 40.00 feet). A Jurisdictional Attacher occupies 2.50 percent of the space weighted by usable space.

The remaining 28.5 feet, or 71.25 percent of the pole, is considered unusable space that is divided equally among attachers because, as recognized by Congress, the unusable space on a pole "is of equal benefit to all entities attaching to the pole".[14] As shown in the following, the total allocation to the Jurisdictional Attacher is the sum of the weighted usable and weighted unusable, or 29.5 percent (rounded).

Allocation of Pole Space

Pole space allocations:

		Usable	Percent	Unusable
Pole height	40.00			
Top and Power use	7.50	7.50	65.22%	0.00
Safety zone	3.33	0.00	0.00%	3.33
Juris. Attachments	1.00	1.00	8.70%	0.00
ILEC	3.00	3.00	26.09%	0.00
Clearance	19.17	0.00	0.00%	19.17
Underground	6.00	0.00	0.00%	6.00
Total	40.00	11.50	100.00%	28.50

Cost Allocation - Jurisdictional Attachments:

Percent Usable (a)	8.70%	
Weighted Usable (b)	28.75%	
Sub-Total © = a X b)		2.50%
Percent Unusable (d)	37.88%	
Weighted Unusable (e)	71.25%	
Sub-Total (f = d X e)		26.99%
Total Cost Allocation © + f)		29.49%
Rounded		29.5%

[14] House Conference Report No. 104-458, p.l. 104-104, at 206.

Pole space allocations:

	-OR-	Usable	Unusable	Total Feet Allocated
Juris. Attachments	Feet	1.0	10.8	11.8
Total pole				40
Percent associated with Jurisdictional Attachers				29.5%

The example illustrated above can also be calculated by dividing the 28.5 feet of unusable space by the average of 2.64 pole users (power company, ILEC and Jurisdictional Attacher) and assigning 10.8 feet to each party (1/2.64 = 0.3787 times 28.5' = 10.8' of unusable space per attacher). The Jurisdictional Attacher's one foot is added for a total of 11.8 feet of the 40-foot pole, or 29.5% of the total.

According to our calculations based on the costs incurred by the Gulf Power Company, the market value of each of the poles as a part of the distribution network is $524.57, recognizing accrued economic depreciation. Applying an appropriate carrying charge, using the FCC methodology (modified to account for depreciation using a sinking fund factor), the annual income required to keep the system of poles in operation (to the benefit of all users) is $141.95/year. Recognizing that the Jurisdictional Attachers (CLECs) are obligated to pay 29.5% of the total annual charge, the fair market annual charge to the Jurisdictional Attachers is $41.87/pole, rounded to $42/pole. The calculations are detailed in the following table:

Depreciated Replacement Cost Approach				
Replacement Cost				Notes for line:
Pole Setting and Pole		$	467.84	1
Plus Entrepreneurial Incentive	15%		70.18	2
Total Replacement Cost, New		$	538.02	3
Less: Depreciation				
32-Yr. Economic Life	1.00			4
24 Yrs. Remain. Life	0.75			5
Depreciation	0.25	$	134.50	6
Depreciated Cost		$	403.52	7
Enhancement Factor at 30%			1.30	8
Market Value Indicated by Depreciated Cost		$	524.57	9
Add: Carrying Charge (FCC Telecom Methodology)				
Administrative Element	[redacted]			10
Maintenance Element				11
Depreciation Element				12
Taxes Element				13
Return Element	7.757%			14
Total Carrying Charge	33.945%			15
Less: Depreciation Element	-8.435%			16
Plus: Sinking Fund Factor	1.55%			17
Adjusted Approved FCC				
Carrying Charge			27.06%	18
Indicated Gross Income		$	141.95	19
Percent to Jurisdictional Attachers			29.50%	20
Rent to Jurisdictional Attachers		$	41.87	21

Notes:

1 Proper appraisal methodology is current replacement cost for a pole rather than historical cost. Data derived from Third Affidavit of Michael R. Dunn. Cross arms are not included.

2 Private sector developers require economic return in excess of cost to undertake new projects. The appraiser believes that 15% of direct cost is reasonable.

3 Total replacement cost, new, including developer's return.

4-5 Accrued Depreciation from Gulf Power Depreciation Study, Docket No. 970643.

6 Accrued depreciation estimated at 25% or $134.50

7 Depreciated replacement cost new of $403.52

8 Corridor literature indicates a synergistic effect; a system of poles that conduct commerce is more valuable than a single unconnected pole.

10-15 Application of FCC approved Telecom rate methodology.

16 To replace accounting historical depreciation with appraisal economic depreciation.

17 Sinking Fund Factor is periodic payment to accumulate each dollar of the waning asset over its 24 year remaining life at the approved "return element" rate.

18 Modified carrying charge rate.

19 Total income required to produce an adequate recovery of the asset plus a return on the invested capital. This is the amount that must be generated annually by all attachers in order to preserve the system.

20 See the discussion of the allocation in the section of the report titled "The Present Formula And Pole Space Allocation System."

21 Allocation of required annual income associated with the Jurisdictional Attachers.

The Sales/Rental Comparison Approach.

Our review of the transactions for pole attachment rentals indicates that there are several instances wherein a power company leased pole attachments to private companies wherein the agreed to rate is in no way constrained by any regulatory agency. In each case, attachments are billed at $40/pole/year (with a minimum charge of $200/year) when leased for commercial purposes. For example, Gulf Power leases space on seven poles to the Frangista Beach Inn at an annual charge of $40/pole/year, and they lease space on nine poles to R. L. Singletary, Inc. for $40/pole/year.

The research we conducted was clear in one indication: when left unfettered by government regulations, there exists a working, private enterprise market for analogues to poles. This is evidenced by such markets as: 1) wireless transmission tower companies agreements with state departments of transportation; 2) fiber optic companies and departments of transportation; 3) wireless communications tower companies and paging companies or other wireless users; 4) fiber optic communications companies and municipalities. These markets share the same types of problems and the same opportunities as the pole rental market.

Joint Use Agreements are agreements negotiated between power companies and telephone companies. They provide evidence of an unregulated, working private market (even among regulated enterprises). These are reciprocal agreements that recognize that the telephone company and the power company have a common interest in sharing poles at an equitable rate, and that both have inventories of poles to share. Both parties determine an "asking" lease rate for poles based on their costs and then negotiate to arrive at rates. Since joint use agreements are not directly controlled by the FCC or FERC regulations, the rate represents a move towards a negotiated rate, each party negotiating in its own self-interest. It is important to recognize, however, that these negotiations are by regulated industries and are rooted in an embedded cost methodology. As we reported earlier, the GULF Joint Use Agreements range from $22/pole (plus "make ready" costs and shared liability) to almost $59/pole. In other power companies we interviewed the rates are between $25/pole and $40/pole.

In one interesting comparison cited earlier, MARTA charges an average rate of roughly $2.50 per linear foot, or about $13,300 per mile. If poles are 250 feet apart there are about 21 poles per mile and the rate could be converted to about $628 per pole.

The Income Capitalization Approach.

Some investors report negotiating deals where they can recover their costs over a payback period of 3.5 to 5 years. Using our Cost of Replacement estimates from above we computed cost-recovery-rental rates as indicated in the accompanying exhibit "Income Appraisal Approach to Pole Rentals."

Another way of looking at the revenue uses the "Share the Savings" method discussed above. We tested this method using estimates of the present average rental rates for the entire company and the results are also shown in the accompanying exhibit, "Income Appraisal Approach to Pole Rentals."

Income Appraisal Approach to Pole Rentals
Test of Payback Decision Rule:

Depreciated Replacement Cost	$524.57
Percent Allocated to Juris. Attachers:	29.5%
Allocated To Attachers	$154.75

Annual Rent/Yr if cost is recovered over payback period of:

	3.0 Yrs.	3.5 Yrs.	4.0 Yrs.	5.0 Yrs.
Juris. Attachers	$ 51.58	$ 44.21	$ 38.69	$ 30.95

Share the Savings

	Cost	Present Rate*	Savings	Share Savings Proposed Rate
Juris. Att.	$ 51.58	$ 4.61	$ 46.97	$ 28.09

- Present rate is based on information provided by Third Affidavit of Michael R. Dunn.

We uncovered several instances of revenue sharing as the basis for a rental agreement. Revenue sharing is an arrangement in which the user or the attaching entity (in appraisal terms this is the "tenant" position) derives income from its use of the underlying infrastructure (e.g., retail property in a shopping mall). The owner of the infrastructure (the "landlord") is compensated for the service by a share in the revenues generated or a combination of a flat lease rate plus a percentage share of the revenue. This shared-revenue income is the equivalent of percentage-rent or overage-rent frequently seen in retail space leases in traditional appraisal assignments. In the retail space market, under a percentage rent lease, landlords receive a percentage of a retail store's gross sales (or restaurant's gross receipts or theater receipts) in addition to the base rental income.

Although historically largely limited to the rental of retail properties, there is at least some evidence that these arrangements are being used for the rental of communication corridors. While the actual percentage of revenue shared may vary widely, our research revealed specific rates negotiated in some agreements, ranging from 6% to 43%. Adesta Communications is paying Longmont Power & Communications (City of Longmont, Colorado) up to 6% of lease income on the city's fiber optics lines as part of an agreement to connect to, and extend, Longmont's fiber communications system. This is a discounted rate to Adesta Communications as part of a "partnership" in which Adesta will construct additional fiber optics lines in the area.

Adesta Communications agreed to pay 33% of lease revenues to the NYSTA for use of the thruway right-of-way for its fiber communications system. Lodestar Towers, Inc. is paying an average rate of 43% to the Florida Department of Transportation for exclusive use of its highway right-of-way. The higher percentages indicated by the two latter examples include a return on the land use.

VII. CONCLUSIONS

1. There are active and competitive markets for corridors, clusters, or systems.

2. Prices are negotiated with consideration of costs, alternatives, and measures of return on investment.

3. Investors are generally not satisfied with ONLY recovering their costs.

4. Parties will take advantage of regulatory constraints to obtain a least cost option if they are not obligated by the market to bargain in good faith.

5. Whenever possible, rational users who aspire to attach to the poles of another, will attempt to pay as little as possible. Stakeholders would expect no less.

6. The market range of pole attachment rates based on non-regulated but embedded cost recovery, as indicated by GULF's Joint Use Agreements, is \$22 to \$59 per pole per year. These numbers also reflect the *quid pro quo* consideration for shared access plus the agreement to pay "make ready" costs and to share liability for any claim arising from ownership of a pole.

7. Using the approved FCC "carrying charge" rate, modified only to replace accounting depreciation with economic depreciation, and applying that rate to our estimate of replacement cost, the yearly rate, per pole attachment, for Jurisdictional Attachers is about $42.

8. Considering a 3.5 year investment payback decision rule, the rental rate would be about $44 for Jurisdictional Attachers.

9. Reconciling these indications we conclude that a conservative fair range for market rental rates for a pole attachment per year would be:

   a. For Jurisdictional Attaching companies . . . . $40 - $45/pole.

We believe that the strongest evidence of a single point estimate, which is based on the cost approach, is $42/pole/year.

End of testimony.

Henry J. Wise

Henry J. Wise

I, the undersigned, a Notary Public in and for said county, in said state, hereby certify that Henry J. Wise, whose name is signed to the foregoing Affidavit, who is known to me, and who did take an oath, acknowledged before this day that, being informed of the contents of said instrument, he executed the same voluntarily on the day the same bears date.

Subscribed and sworn to me this 8 day of August, 2000.

Notary Public, Gwinnett County, Georgia
My Commission Expires July 21, 2001

Notary Public

CERTIFICATION

I certify that, to the best of my knowledge and belief:

1. The statements of fact contained in this report are true and correct.

2. The reported analyses, opinions and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, unbiased professional analyses, opinions and conclusions.

3. I have no present or prospective interest in the properties that are the subject of this report, and I have no personal interest or bias with respect to the parties involved.

4. My compensation is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event. The assignment was not based on a requested minimum valuation, a specific valuation, or the approval of a loan.

5. My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP) as promulgated by the Appraisal Standards Board of The Appraisal Foundation.

6. Properties analyzed in this report are generic in scope, and no personal inspection is germane.

7. James H. Pritchett, MAI; James D. Vernor, Ph. D., MAI; Allen R. Kolb, MAI; and Melanie Mueller Latham are credited with providing significant professional assistance to the person signing this report.

8. Disclosure of the contents of this appraisal report is governed by the By-Laws and Regulations of the Appraisal Institute. Neither all nor any part of the contents of this report, especially any conclusions as to value, the identity of the appraisers or the firm with which they are connected, or any reference to the Appraisal Institute shall be disseminated to the public through advertising media, news media, sales media or any other public means of communication without the prior written consent and approval of the undersigned.

9. This report may be reviewed by duly authorized representatives of the Appraisal Institute as a part of peer review and/or compliance with the Institute's Standards of Professional Practice or Code of Ethics.

10. The Appraisal Institute conducts a voluntary program of continuing education for its designated members. Members who meet the minimum standard of this program are awarded periodic educational certifications. As of the date of this report, Henry J. Wise has completed the requirements of the continuing education program of the Appraisal Institute.

Henry J. Wise 8/8/00

Henry J. Wise, MAI
Senior Vice President
Georgia Certified Real Estate Appraiser # 000202