

Exhibit LMG #1

In the Matter of AMENDMENT OF COMMISSION'S RULES AND POLICIES
GOVERNING POLE ATTACHMENTS; In the Matter of IMPLEMENTATION OF
SECTION 703(e) OF THE TELECOMMUNICATIONS ACT OF 1996

CS Docket No. 97-98; CS Docket No. 97-151

FEDERAL COMMUNICATIONS COMMISSION

*16 FCC Rcd 12103; 2001 FCC LEXIS 4952; 66 FR 34569; 30 Comm. Reg.
(P & F) 1288*

RELEASE-NUMBER: FCC 01-170

May 25, 2001 Released; Adopted May 22, 2001

ACTION: **[**1]** CONSOLIDATED PARTIAL ORDER ON RECONSIDERATION

(INTRODUCTION AND SELECTED PORTIONS ONLY)

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JUDGES:

By the Commission

OPINION:

[*12105] I. INTRODUCTION

1. In this Consolidated Partial Order on Reconsideration ("*Reconsideration Order*"), we consolidate two reconsideration proceedings raising similar and interrelated issues concerning the rates, terms and conditions of access for attachments by cable operators and telecommunications carriers to utility poles, ducts, conduits and rights-of-way pursuant to Section 224 of the Communications Act of 1934, *as amended* ("*Pole Attachment Act*") n1 and Subpart J of the Commission's Rules. n2 On February 6, 1998, we released a Report and Order, *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, FCC 98-20 [11 CR 79] ("*Telecom Order*"), n3 adopting rules implementing section 703(e) of the Telecommunications Act of 1996 ("*1996 Act*") n4 relating to pole attachments. n5 On April 3, 2000, we released a Report and Order, *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, FCC 00-116 [19 CR 1280] ("*Fee Order*") n6 addressing concerns about the application **[**2]** of our formula for determining reasonable rates for pole attachments. We have determined that it is in the interest of administrative efficiency and regulatory effectiveness to consolidate these two reconsideration proceedings. n7

n1 47 USC § 224.

n2 47 CFR § § 1.1401-1.1418.

n3 13 FCC Rcd 6777 [11 CR 79] (1998); *affirmed in part, reversed in part, Gulf Power v. FCC*, 208 F3d 1263 [20 CR 265] (11th Cir 2000) ("*Gulf Power II*"), *motion for stay granted; petition for cert. granted January 22, 2001*.

n4 P.L. No. 104-104, 110 Stat 61, 149-151.

n5 Section 703 of the 1996 Act amended § 224 of the Communications Act of 1934, *codified* at various subsections of 47 USC § 224. Section 703 codified at 47 USC P224(f) was challenged in court. *See Gulf Power, et al., v. FCC and USA*, 998 F Supp 1398 (ND Fla 1998), *affirmed*, 187 F3d 1324 [17 CR 390] (11th Cir 1999) ("*Gulf Power I*").

n6 15 FCC Rcd 6453 [19 CR 1280] (2000). **[**3]**

n7 In deciding this matter, all of the petitions, comments in support or opposition to the petitions, and replies of all parties filed in both rulemaking reconsideration proceedings have been reviewed. We have determined that the two proceedings raise many of the same issues, cover the same statutory authority, 47 USC § 224, and involve the same industries (cable television systems, telecommunications systems and utilities). Many of the same industry representatives and parties submitted filings in both proceedings. See Appendix B and Appendix C for lists of all parties submitting filings. UTC/EEI suggest that the Commission should "... adopt all pole attachment-related regulations together so that the parties are given the ability to assess their rights and obligations." UTC/EEI *Telecom Order* Reconsideration Petition at 23.

2. In the *Telecom Order*, we implemented Section 703(e) of the 1996 Act n8 by prescribing regulations, n9 effective February 8, 2001, n10 to ensure that a utility n11 complies with the Pole **[*12106]** Attachment Act's requirements for just and reasonable rates, terms and conditions and nondiscriminatory access for pole **[**4]** attachments used to provide telecommunications services. n12 Among other things, the *Telecom Order* considered the 1996 Act, *Telecom Order* comments and *Telecom Order* reply comments filed in response to the *Telecom Order Notice*. n13 Increases in prescribed rates for telecommunications services attachers pursuant to section 224(e) of the Pole Attachment Act are to be phased in over five years beginning February 8, 2001. n14

n8 47 USC § 224(e)(1-4); see also, 47 USC § 224(d)(3).

n9 See *Telecom Order* at Appendix A; 47 CFR § 1.1401-1.1418.

n10 See 47 USC § 224(e)(4).

n11 A "utility" is defined as any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduit or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State. 47 USC § 224(a)(1).

n12 47 USC § 224(e)(1). See also 47 USC § 224(a)(5) exempting pole attachments of telecommunications carriers who are also incumbent local exchange carriers ("ILECs"). **[**5]**

n13 *Notice of Proposed Rulemaking, Implementation of Section 703(e) of the Telecommunications Act of 1996. Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 12 FCC Rcd 11725 [11 CR 2037] (1997).

n14 47 USC § 224(e)(4); 47 CFR § 1,1409(f).

3. Appeals of the *Telecom Order* were consolidated in the United States Court of Appeals for the 11th Circuit and resulted in a decision, *Gulf Power, et al. v. FCC and USA ("Gulf Power II")*. n15 That decision was stayed by the 11th Circuit Court of Appeals and the Commission filed a petition for certiorari with the United States Supreme Court which was granted. Because two issues, the application of the Pole Attachment Act to wireless telecommunications service providers and the effect of Internet service on pole attachments are the subject of the appeal of *Gulf Power II*, we decline to address those issues at this time, pending the issuance of a final mandate from the courts. In addition, the regulatory status of cable Internet access is the subject of an ongoing Notice of Inquiry ("NOI"), n16 the resolution of which may affect **[**6]** our determination of this issue. Therefore, we reserve review of our position that wireless telecommunications service providers are covered by the Pole Attachment Act and that Internet service is neutral for purposes of determining the character of the attachment as cable or telecommunications. However, these two issues remain open and will be the subject of a later order once we have received guidance from the courts and have had an opportunity to review the additional comments received in the NOI proceeding.

n15 208 F3d 1263 [20 CR 265] (11 Cir 2000).

n16 *Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities*, FCC 00-355 (released September 28, 2000).

4 In the *Fee Order*, we adopted rules based on the comments filed in response to the *Fee Order Notice*. n17 We also considered the *Telecom Order* comments and reply comments when relevant to the issues addressed. Among other things, the *Fee Order* addressed the use of certain presumptions in our rate calculation methodology, the carrying charge rate elements used in our formulas, the use of gross versus net data in our formulas used to determine **[**7]** a maximum just and **[*12107]** reasonable rate for pole attachments, the regulatory accounts to be used in our formulas, and the formula used to determine a maximum rate for attachments to conduit.

n17 *Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing Pole Attachments*, 12 FCC Rcd 7449 [19 CR 2191] (1997).

5. In this *Reconsideration Order*, we grant in part and deny in part petitions for reconsideration and/or clarification of our *Telecom Order* ("Telecom Order petitions"). Nine *Telecom Order* petitions were filed, and in response 15 parties filed *Telecom Order* reconsideration comments and nine parties filed *Telecom Order* replies. n18 In this *Reconsideration Order*, we also grant in part and deny in part petitions for reconsideration and/or clarification of our *Fee Order* ("Fee Order petitions"). n19 Five *Fee Order* petitions were filed and in response two parties filed *Fee Order* reconsideration comments and four parties filed *Fee Order* replies. n20

n18 See Appendix C.

n19 *Fee Order* petitions were filed by: American Electric Power Services Corporation, and others (American Electric), Southern Company Services, Inc., et al., (Southern Co.), Texas Cable & Telecommunications Association (TxCTA), United States Telecom Association (formerly the United States Telephone Association) (USTA), United Telecom Council and the Edison Electric Institute (UTC/EEI). A full listing of all parties filing *Fee Order* petitions, *Fee Order* comments and *Fee Order* replies to *Fee Order* petitions and comments, as well as abbreviations used to identify these parties in this *Reconsideration Order*, is contained in Appendix B, hereto. **[**8]**

n20 See Appendix B.

6. In this *Reconsideration Order*, we

(a) affirm our decision not to impose additional regulation on the negotiation process or on the rules for resolution of pole attachment complaints; n21

(b) affirm the continued use, in the pole attachment rate calculation formulas, of specific regulatory accounts maintained by utilities that identify the actual costs incurred by the utilities for the poles, ducts, conduits and rights-of-way that are the subject of the attachment; n22

(c) reconsider and clarify the way in which entities are counted for the purpose of allocating and apportioning costs of unusable space for telecommunications attachers after February 8, 2001; n23

(e) reconsider and clarify the geographic areas used to determine average numbers of attaching entities for use in calculations of the formulas for telecommunications pole attachment rates, and establish two presumptive averages that may be used in our formulas after February 8, 2001; n24

[*12108] (f) affirm and clarify our decisions regarding third party overloading; n25

(g) affirm the presumption that a pole attachment occupies one foot of usable space occupied and that this presumption **[**9]** is rebuttable by either party; n26

(h) affirm that the formula adopted in the *Fee Order*, for calculating the rate for use of capacity in a conduit, is applicable to telecommunications systems; affirm the use in the formula of the actual percentage of the conduit capacity occupied, with a rebuttable presumption that an attacher occupies one-half duct; n27 affirm our decision that there is no unusable capacity in a conduit; n28 and affirm our decision that a utility may not

exclude reserved capacity within a conduit system when calculating total capacity upon which the pole attachment rate in a conduit is based; n29

(i) affirm our position that complaints regarding nondiscriminatory access, rates, terms and conditions for non-traditional pole attachments, such as attachments to rights-of-way, wireless attachments and transmission facilities attachments, will be considered under our rules on a case-by-case basis; n30

(j) reconsider and clarify our methodology for calculating maximum pole attachment rates when the net pole investment becomes zero or negative. n31

(k) decline to reconsider at this time and reserve for later review, our decision that Internet service has a neutral **[**10]** affect on an attacher's classification as a cable system or telecommunications system;

(l) decline to reconsider at this time and reserve for later review, our decision that providers of wireless telecommunications services are entitled to the benefits and protection of the Pole Attachment Act; and

(m) amend our rules to reflect our decisions in this *Reconsideration Order*.

n21 See *Telecom Order* at PP10-21.

n22 See *Telecom Order* at PP122-124; see also, *Fee Order* at PP8-11.

n23 Cf. *Telecom Order* at PP45-58.

n24 Cf. *Telecom Order* at PP74-79.

n25 See and cf. *Telecom Order* at PP65-73 regarding treatment of unusable space, PP92-95 regarding treatment of usable space.

n26 Cf. *Telecom Order* at PP83-91.

n27 Cf. *Telecom Order* at P115.

n28 Cf. *Telecom Order* at PP107-111. *Fee Order* at PP90-91 and n. 290.

n29 See *Telecom Order* at P110. *Fee Order* at P91.

n30 See *Telecom Order* at PP117-121 and n. 390.

n31 *Fee Order* at PP31, 33-34.

[*12109] II. BACKGROUND

7. In 1978, Congress enacted section 224 of the Communications Act n32 granting the Commission authority to regulate the rates, terms, and conditions **[**11]** governing pole attachments, requiring that such rates, terms and conditions be just and reasonable. n33 The Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions. n34 Congress sought to constrain the ability of utilities to extract monopoly profits from cable television system operators in need of pole, duct, conduit or right-of-way space for pole attachments. n35

n32 P.L. No. 95-234, 92 Stat 33 ("Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 USC § 224.

n33 The Commission's authority does not extend to pole attachment rates, terms, and conditions that a state regulates. 47 USC § 224(c)(1). Jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission, with respect to individual matters, also occurs if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 USC § 224(c)(3). See Public Notice, *States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd 1498 (1992). **[**12]**

D. Overlashing

1. Space Occupied by Third Party Overlashing

73. Cable companies have, through overlashing, been able for decades to replace deteriorated cables or expand the capacity of existing communications facilities, by tying communication conductors to existing, supportive strands of cable on poles. n252 The 1996 Act was designed to accelerate rapid deployment of telecommunications and other services, and to increase competition among providers of these services. n253 Overlashing existing cable reduces construction disruption and associated expense. n254 Accordingly, in the *Telecom Order*, we declared our **[*12141]** continued approval of, and support for, third party overlashing, subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment. n255

n252 *Telecom Order* at P59-62. See also, Comcast, et al., *Telecom Order* reply at 8 (cable operators have routinely overlashed for 30 years); NCTA *Telecom Order* comments at 5 (overlashing has been a critical component of cable industry's construction strategy for decades).

n253 See *Conf. Rpt.* at 124, Joint Explanatory Statement of the Committee of Conference. **[**95]**

n254 The Commission has recognized overlashing as a legitimate and desirable practice, especially because utility poles are often regarded as essential facilities. See *Overlashing Public Notice* (1995); see also, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21429 [9 CR 730] (1997), *aff'd*, FCC 98-216 [13 CR 408] (Sept. 4, 1998).

n255 *Telecom Order* at P68; see also discussion at PP59-64 of the *Telecom Order*.

74. We determined that facilities overlashed by third parties are presumed to share the presumptive one foot of usable space occupied by the host attachment. n256 We did not dictate how the utility, host attaching and third party attaching entities would relate to each other for compensation purposes. n257 We did not require the host attaching entity or the third party overlasher to obtain the consent of the utility beyond the consent already acquired for the host attachment although the utility is entitled to notice of the overlashing. We stated that third party overlashing did not disadvantage the utility's ability to ensure the integrity of its poles. n258

n256 *Telecom Order* at P92.

n257 *Telecom Order* at P69. **[**96]**

n258 *Telecom Order* at P68.

75. Some *Telecom Order* petitioners continue to urge that we impose additional regulation on third party overlashing. n259 We decline to impose additional regulation and clarify several aspects of our position regarding third party overlashing. n260 Allowing third party overlashing reduces construction disruption and associated expenses which would otherwise be incurred by third parties installing new poles and separate attachments. n261 We clarify that third party overlashing is subject to the same safety, reliability, and engineering constraints that apply to overlashing the host pole attachment. n262 We affirm our policy n263 that neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment. n264

n259 See, e.g., MCI *Telecom Order* petition at 8-13; SBC *Telecom Order* petition at 7-8; USTA *Telecom Order* petition at 11-12; U S West *Telecom Order* petition at 2.

n260 *Telecom Order* at P68, referencing the Preamble to 1996 Act.

n261 See, e.g., BellSouth *Telecom Order* comments at 1-2; NCTA *Telecom Order* comments at 5-10. **[**97]**

n262 *Telecom Order* at P68.

n263 See *Local Competition Order*, 11 FCC Rcd 15499 [4 CR 1] (1996) at PP1161-64; *Telecom Order* at P68.

n264 See, e.g., U S West *Telecom Order* petition at 3-4; see also, Ameritech *Telecom Order* comments at 4-5; Bell Atlantic *Telecom Order* comments at 8; BellSouth *Telecom Order* comments at 1-2. Cf. *Local Competition Order*, 11 FCC Rcd 15499 [4 CR 1] at PP1161-64; *Telecom Order* at P68.

[*12142] 2. What the Third Party Overlasher Pays

76 Some petitioners urge us to specify, or at least clarify, what the third party telecommunications carrier overlasher pays to the host attacher or the utility pole owner. n265 We decline to attempt to regulate this relationship. n266 However, if the third party overlasher is a cable operator's pole attachment is a telecommunications carrier, then the pole attachment will be considered to be used to provide telecommunications services for purposes of calculating the pole attachment rate. The maximum rate for that overlasher pole attachment would then be calculated using the *Telecom Formula* after February 8, 2001. n267 **[**98]** In some instances, the host attaching entity will pay the utility for a telecommunications carrier pole attachment. n268 We have stated that the third party overlasher is not separately liable to the utility for the usable space which the overlasher shares with the host attachment because there would be no additional usable space occupied. We expect and encourage the overlasher and host attaching entities to negotiate a just and reasonable rate of compensation between them for the overlasher, which will represent some sharing of the usable and unusable space costs. n269 Until our intervention is necessary to facilitate pole attachments for these parties, we will rely on all parties to act in good faith to develop their own just and reasonable compensation.

n265 MCI *Telecom Order* petition at 13; SBC *Telecom Order* petition at 7-8; USTA *Telecom Order* petition at 11-12; U S West *Telecom Order* petition at 3.

n266 See, e.g., U S West *Telecom Order* petition at 3-4. But see, MCI *Telecom Order* petition at 9; USTA *Telecom Order* petition at 11; cf. NCTA *Telecom Order* comments at 14.

n267 See *Telecom Order* at P69 (third party overlasher by a telecommunications carrier); P73 & P94 (discussion of dark fiber), P73. **[**99]**

n268 47 USC § 224(e).

n269 *Telecom Order* at P94. Cf. 47 USC § 224(d)(1) and 47 USC § 224(e)(3).

3. Wind and Weight Load Factors

77. *Fee Order* petitioners continue to urge that we allow some factor for increased weight and wind load in cases of overlasher. n270 We have reviewed Sections 24 through 26 of the NESC n271 that address loading and structural requirements in detail. n272 Based on our analysis and the record, we continue to believe that an attachment's "burden on the pole" relates to an assessment of need for make-ready changes to the pole structure, including pole change-out, to meet the strength requirements of the NESC. For example, if the addition of overlasher wires to an existing attachment causes an excessive weight to be added to the pole requiring additional support or causes the cable sag to increase to a point below safety standards, then the attacher must pay the make-ready charges to increase the height or strength of the pole. Make-ready costs are non-recurring **[*12143]** costs for which the utility is directly compensated and as such are excluded **[**100]** from expenses used in the rate calculation. n273 The statutory language prescribes that we allocate costs based on space occupied, not load capacity. n274

n270 American Electric, *Fee Order* petition at 9-11; UTC/EEI *Fee Order* petition at 9-10. But see WorldCom *Fee Order* recon. comments at 7.

n271 National Electric Safety Code.

n272 NESC at 142-168, Sections 24-26.

n273 See *Second Report and Order*, 72 FCC 2d 59 [45 RR 2d 1005], at P27.