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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Cincinnati Bell Telephone Company LLC To modify the Pole and Anchor Attachment and Conduit Occupancy Accommodations PUCO No. 1 Tariff to Change the Pole and and Attachment Charge and Clarify Language. | ) ) ) ) ) ) ) | Case No. 05-1339-TP-SLF |

**MOTION TO INTERVENE;**
**MOTION TO DISMISS;**
**REQUEST FOR SUSPENSION;**
**REQUEST FOR HEARING;**
**AND**
**OBJECTIONS OF TIME WARNER ENTERTAINMENT COMPANY, L.P., dba TIME WARNER CABLE**

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Time Warner Entertainment Company, L.P., dba Time Warner Cable ("Time Warner"), a cable television operator which provides cable television service to subscribers in the Cincinnati Bell Telephone Company ("CBT") service territory, respectfully moves to intervene in this proceeding. Time Warner also moves the Commission to dismiss CBT's Self-Complaint because it violates the Commission's elective alternative regulation retail price commitment rules. In the alternative, Time Warner moves that the Commission fully suspend the Self-Complaint and remove it from the 60-day automatic time line as set forth in Rule 4901:1-6-05(B) and 4901:1-6-22(A) of the Ohio Administrative Code ("O.A.C."), and schedule it for a hearing. Finally, Time Warner submits objections to the Self-Complaint, setting forth the reasons why the proposed pole attachment charges and tariff language are unjust and unreasonable and must be rejected.

The grounds for these motions and the objections to CBT's Self-Complaint are set forth in the accompanying memorandum in support.

Respectfully submitted,

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**TIME WARNER CABLE'S MEMORANDUM IN SUPPORT**

## I. Introduction

On November 2, 2005, Cincinnati Bell Telephone Company ("CBT") filed a Self-Complaint in Case No. 05-1339-TP-SLF seeking to modify its Pole and Anchor Attachment and Conduit Occupancy Accommodations PUCO No. 1 Tariff. CBT seeks to increase and change the pole attachment charges and to change certain tariff language. The 61st day after the November 2, 2005 filing of the Self-Complaint would be January 2, 2006.

## II. Motion to Intervene

Time Warner Entertainment Company, L.P. dba Time Warner Cable ("Time Warner"), a cable television operator, provides cable television and high-speed Internet access cable modem services to subscribers throughout Ohio, including in CBT's service territory. Time Warner's facilities occupy space on certain CBT poles in southwestern Ohio. In order to provide its services, Time Warner depends on its ability to attach its cable facilities to poles owned and maintained by CBT. Local laws, environmental restrictions and other legal and economic barriers preclude the placing of

additional sets of poles in areas where poles already exist or constructing cable facilities entirely underground. See *Southern Co. v. FCC,* 293 F.3d 1338, 1341 (11th Cir. 2002). As the Eleventh Circuit has noted: "From the inception of the cable television industry, cable television companies have attached their distribution cables to utility poles owned and maintained by power and telephone companies. As a practical matter, cable companies have had little choice but to do so." See also *National Cable & Telecomm. Ass'n v. Gulf Power Co.,* 534 U.S. 327, 330 (2002) ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."). Effective regulation of pole facilities is thus crucial to ensure access by cable operators at just and reasonable rates, terms and conditions and to promote facilities-based competition. This Commission has been regulating the pole attachment rates, terms and conditions of attachment of CBT, as contained in its tariff, since the Commission's January 7, 1983 Opinion and Order in Case No. 81-1338-TP-AIR.

As a cable television operator that attaches to CBT poles, Time Warner is subject to the rates, terms and conditions contained in CBT's tariff approved by the Commission for pole attachments. Time Warner Cable currently pays the existing tariffed rate of $4.50 per pole per year. Through its Self-Complaint, however, CBT proposes to double the rate to $9.00 for attachments "Used by Cable Operator to Provide Only Cable Services." For attachments "Used by Cable Operator to Provide Telecommunications Services" and for "each piece" of specified and unspecified

"auxiliary equipment," CBT proposes to increase the rate to $18.00 annually. Although Time Warner does not itself provide telecommunications services, it licenses transmission capacity on some fiber-optic cables to others whose services may include telecommunications services. Time Warner also attaches "auxiliary equipment" to CBT poles. Accordingly, Time Warner has a direct interest in each of the new rates proposed by CBT.

Section 4903.221(B) of the Revised Code sets forth the following criteria that the Commission must consider in ruling upon applications or motions to intervene in its proceedings:

> (1) The nature and extent of the prospective intervener's interests;
>
> (2) The legal position advanced by the prospective intervener and its probable relation to the merits of the case;
>
> (3) Whether the intervention by the prospective intervener will unduly prolong or delay the proceeding; and
>
> (4) Whether the prospective intervener will significantly contribute to full development and equitable resolution of the factual issues.

Similarly, Rule 4901-1-11(B) of the O.A.C. sets forth the criteria that the Commission, legal director, deputy legal director, or the attorney examiner assigned to a case may consider in permitting intervention in a proceeding:

> (1) The nature of the person's interests;
>
> (2) The extent to which the person's interests is represented by existing parties;
>
> (3) The person's potential contribution to a just and expeditious resolution of the issues involved in the proceeding; and

(4) Whether granting the request and intervention would unduly delay the proceeding or unjustly prejudice any existing party.

Time Warner has a real and substantial interest in this case. It will be adversely affected by the proposed tariff and rate changes. In the locations where CBT has poles,[1] Time Warner has no alternative source for attachment of aerial facilities. No one else has intervened to protect Time Warner's interests. Time Warner will contribute to a just and expeditious resolution of the issues in this proceeding and is filing well before the 60-day approval period for self-complaints.

Time Warner has demonstrated that it meets the criteria of both § 4903.221(B) of the Revised Code and Rule 4901-1-11(B) of the O.A.C. Time Warner has a real and substantial interest in this case and seeks intervention in order to protect that interest. Time Warner's Motion to Intervene should be granted.

## III. Motion to Dismiss

CBT is subject to an elective alternative regulation plan under Case No. 04-720-TP-ALT. This Commission-approved plan, which went into effect on July 1, 2004, is controlled by Rule 4901:1-4-05 of the O.A.C. Rule 4901:1-4-5 sets forth certain alternative regulation commitments for incumbent local exchange carriers, such as CBT, which opt for elective alternative regulation plans. CBT's proposal violates the Commission's rule addressing retail pricing commitments.

Analyzing the recent history of CBT's alternative regulation cases is helpful in understanding how CBT has violated the Commission's rules and how it has misclassified pole attachment and conduit occupancy services. On April 11, 1994, CBT

[1] Although Cincinnati Gas & Electric ("CG&E") also owns poles in southwestern Ohio, CBT and CG&E share poles, and only extremely rarely would CG&E and CBT offer alternative sources for pole attachments in approximately the same location.

filed a modified alternative regulation plan in its initial alternative regulation proceeding in Case No. 93-432-TP-ALT which was adopted by the Commission. That plan contained a service cell classification or cell matrix. In the plan, CBT described Cell one as containing "basic local exchange services that provide access to CBT's network; installation charges for these services; maintenance of these services that is not available from a competitive source; services essential for public safety or the protection of privacy; and all local usage." See page 23 of the Alterative Regulation Plan, marked as Attachment 1 to the April 11, 1994 Stipulation and Recommendation in Case No. 93-432-TP-ALT. Pole attachment and conduit occupancy was listed under Cell one.

In 2003 the Commission issued Chapter 4901:1-6 of the O.A.C. entitled "Retail Service Rules for Telephone Companies; Certification; Contracts." Among other things, these rules established five categories of services: Tier 1 core, Tier 1 non-core, Tier 2, non-specific service charges, and non-recurring service charges. Rule 4901:1-6-20 of the O.A.C. defines Tier 1 to include "basic local exchange service as defined in section 4927.01 of the Revised Code, as well as those services that are not essential but nevertheless retain such a high level of public interest that these services still require regulatory oversight." The Commission classified basic local exchange service and basic caller identification (number delivery only services) as Tier 1 core services which are to be afforded continued regulatory oversight. The Commission also listed eight other services as Tier 1 non-core services. However, the Commission in Rule 4901:1-6-20 of the O.A.C. specifically reserved the right to add any new service to these lists in the future for which the Commission determines that a specific public interest exists.

Time Warner submits that the specific public interest requires that pole attachments and conduit occupancy should be classified as a Tier 1 core service. Time Warner is limited to licensing space on the poles of CBT and CG&E in southwestern Ohio. Numerous courts have recognized that attachers often have no choice but to attach to monopoly utility-owned poles in order to provide services . See, e.g., *National Cable & Telcomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002). The General Assembly has determined that pole attachment rates require regulatory oversight. See Section 4905.71 of the Revised Code. Pole attachment and conduit occupancy is essential to providing cable television service. It is still a monopoly service, and, as evidenced by the very proposals contained in this Self-Complaint, still require regulatory oversight as a Tier 1 core service.

Having opted for an elective alternative regulation plan, CBT is subject to the Tier 1 rate caps under Rule 4901:1-4-05(C)(3) of the O.A.C. Specifically, an ILEC such as CBT adopting elective alternative regulation must cap the in-territory rates for Tier 1 core services at the existing rates for as long as the company remains under elective alternative regulation. The existing rates for Tier 1 core services constitute the ceiling below which the ILEC may lower or raise rates. CBT's proposal contained in the Self-Complaint to increase the pole attachment rate applicable to attachments used by cable operators to provide cable services from the existing rate of $4.50 to $9.00, and to charge cable operators $18 for attachments used to provide telecommunications services and for "each piece" of "auxiliary equipment" violates the rate cap for Tier 1 core services. The Self-Complaint should be dismissed because it violates Commission's

rules. CBT cannot charge pole attachment rates above the existing rate levels during the elective alternative regulation plan.

Even if pole attachments and conduit occupancy were to be categorized as a Tier 1 non-core service, CBT has still violated the Commission's retail rate commitments for Tier 1 rate caps. If the Commission does not find pole attachment and conduit occupancy services to be Tier 1 core services, at the very least, it must find that pole attachment rates are Tier 1 non-core services for the reasons expressed above. Thus, pole attachment rates, terms and conditions and conduit occupancy is clearly a Tier 1 service, whether it is classified as a core or non-core.

Under Rule 4901:1-4-05(C)(3) of the O.A.C., an electing ILEC is required to cap Tier 1 core rates at their existing levels and the rates for all in-territory non-core, Tier 1 services at existing rates for twenty-four (24) months from the effective date of the alternative regulation plan. In its Self-Complaint, CBT proposes to increase the existing rates in January 2006. Because CBT's elective alternative regulation plan went into effect on July 1, 2004, the twenty-four (24) month period does not expire until June 30, 2006. The rule allows an electing ILEC to lower or raise rates for Tier 1 non-core services, but such rate activity must be below the caps set forth in its existing tariff.

CBT will likely argue that under its current elective alternative regulation plan, pole attachments and conduit occupancy are "Non-Tier services"[2] which, according to CBT, are governed by either "the rules for non-specific service charges established in Case No. 00-1532-TP-COI or by rules and regulations established in other proceedings." See CBT General Exchange Tariff No. 8, Preface, Original Page 21. CBT will argue that tier pricing rules do not apply to pole attachment and conduit occupancy services.

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2 The Commission's rules do not mention "Non-Tier" services.

But the Commission's own rules demonstrate that pole attachments and conduit occupancy should not be classified as "Non-Tier services" or non-specific service charges. Rule 4901:1-6-22(A) of the O.A.C. provides as follows:

> (A) Nonspecific service charges
>
> Nonspecific services charges (e.g., late payment and return check charges) are charges that are avoidable and under the control of the customer. ILEC non-specific service charges are capped at existing rates unless changed through an SLF case. The Commission will apply a reasonableness standard to telephone companies' nonspecific service charges. Nonspecific service charges may be introduced or increased through a sixty day self-complaint (SLF).

Unlike late payment fees and return check charges, pole attachment and conduit occupancy services are not avoidable and under the control of the customer. Cable operators need to obtain pole attachments and conduit occupancy services from public utilities in order to provide service to cable customers. They cannot "avoid" requests for service from cable customers and cannot "control" those requests. It is obvious that pole attachment and conduit occupancy charges do not fit within the Commission's definition of "non-specific service charges." Therefore, CBT cannot use the self-complaint device as contemplated under Rule 4901:1-6-22(A) of the O.A.C. to increase pole attachment and conduit occupancy rates.

If pole attachment and conduit occupancy charges are not non-specific service charges, then one must determine if there are "rules and regulations established in other proceedings" which govern the treatment of pole attachments and conduit occupancy charges. There are not. Since 1982 pole attachment and conduit occupancy rates have always been established through rate increase applications under

Section 4909.18, Revised Code. Thus, the Commission must either find that pole attachment and conduit occupancy services should be classified to Tier 1 core or Tier 1 non-core services and apply the retail pricing rules, or that increases to pole attachment and conduit occupancy rates may only be implemented through a general rate increase application. CBT should not be permitted to twist Rule 4901:1-6-22(A) of the O.A.C. in order to use a self-complaint process to increase the rates and charges for these services. The Self-Complaint must be dismissed.

CBT has ignored and distorted the Commission's rules. It is proposing to increase the rates for what should be classified as a Tier 1 core service, not non-specific service charges, above the existing levels. That is a violation of the retail pricing commitment rules. But even if the Commission were to consider pole attachment and conduit occupancy to be a Tier 1 non-core service, CBT's effort to increase the rates within the twenty-four (24) month period violates the Commission's rules. The Self-Complaint must be dismissed because pole attachment and conduit occupancy rates are not non-specific service charges, CBT did not file a rate increase application, and because the proposed increases directly violate Rule 4901:1-4-05(C)(3)(a) of the O.A.C.

## IV. Request for Suspension

If the Commission does not dismiss the Self-Complaint, Time Warner respectfully requests that in the alternative, the Commission grant a full suspension pursuant to Rule 4901:1-6-04(B) of the O.A.C. There are a variety of reasons why the Self-Complaint, if not dismissed, should be suspended. First, pole attachment and conduit occupancy rates are not "non-specific service charges" as defined by Rule 4901:1-6-22(A) of the O.A.C., and a self-complaint cannot be used to increase the rates. Second, because pole attachment and conduit occupancy rates should be classified as a

Tier 1 service, the proposed rate increase violates the elective alternative regulation retail pricing commitment rules as described above. Third, CBT has given no rationale or reason why the increased pole attachment rates are appropriate. This Commission has, by established precedent, consistently used the FCC pole attachment rate formula as a basis for calculating the appropriate pole attachment rate for CBT going back to 1983. No evidence of any calculation has been provided by CBT. Pricing for pole attachment rental space should not be based upon what the market will bear; this is a monopoly service.

CBT's proposed charges for attachments used by cable operators to provide "telecommunications services" and for "each piece" of "auxiliary equipment" are also without basis. No rationale is given as to why these proposed charges are just and reasonable or consistent with the methodology adopted by the Commission in setting pole attachment rates.

In summary, all of these factors and the objections set forth in this pleading clearly demonstrate that the proposed changes to the pole attachment rate and tariff are neither just nor reasonable. Clearly, these proposed changes should not be automatically approved. Time Warner respectfully requests that if the Self-Complaint is not dismissed, it be fully suspended as provided in Rule 4901:1-6-04(B) of the O.A.C.

## V. Request for Hearing

Even if the Commission chooses not to dismiss the Self-Complaint, at the very least, the Commission must hold a hearing. If this Self-Complaint were an application for a rate increase under Section 4909.18, Revised Code, the Commission would be required to hold a hearing. CBT has not provided any rationale or explanation in support of increasing the pole attachment rate for cable services, applying a rate higher

still for non-cable services, or making the other tariff changes. In fact, CBT is distorting and violating the Commission's rules by proposing an increase to a Tier 1 core or non-core service such as pole attachments. CBT has provided no calculation to show that the increased rates comport with the methodology consistently applied by this Commission in establishing pole attachment rates. Further, no rationale has been offered in support of the proposed rate for telecommunications attachments or for auxiliary equipment. Finally, the wording of the proposed tariff revisions is ambiguous and open-ended. CBT has not clarified how it intends to interpret the tariff, and several possible interpretations would be in violation of the Commission's reliance on FCC precedent in connection with pole attachment charges. Under Section 4909.18 of the Revised Code, the Commission should find that CBT's proposed tariff revisions "may be unjust or unreasonable." At the very least, the Commission should suspend the 60-day automatic period and hold a hearing in this matter.

## VI. Objections to the Self-Complaint

CBT's proposed pole attachment rate of $9 for cable attachments exceeds the just and reasonable standard established by the Commission more than twenty years ago. CBT's Tariff is objectionable in several other significant respects relating to pole attachment rates and charges.

### A. CBT's Pole Attachment Rate Must Be Calculated Using The FCC Formula.

In 1982 the Commission "decided to adopt the formula used by the Federal Communications Commission (FCC) in setting [pole attachment] rates . . . ." See *In re Cincinnati Bell for Authority to Adjust its Rates and Charges and to Change its Tariffs*, Case No., 81-1338-TP-AIR, Opinion and Order, Mar. 9, 1982, p. 42. (citing *Ohio*

*Bell Tele. Co.*, Case No. 81-1433-TP-AIR (Dec. 22, 1982), and *Columbus & Southern Ohio Elec. Co.*, Case No. 81-1058-EL-AIR (Nov. 5, 1982)). The Commission adopted the FCC's "methodology in an effort to establish an approach which can be uniformly applied in all cases, thereby simplifying the process of determining the charges without sacrificing the reasonableness of the result." *In re Cincinnati Bell for Authority to Adjust its Rates and Charges and to Change its Tariffs*, Case No. 81-1338-TP-AIR, Opinion and Order, Mar. 9, 1982, p. 42-43.

A year later in 1983 when CBT sought to change its pole attachment rate and tariff, the Commission directed CBT to "file proposed pole attachment charges computed on the basis of the FCC formula . . . ." *Id.* at 43. Ever since, the Commission has calculated CBT's pole attachment rate in accordance with the FCC's pole rate methodology. *See, e.g., In re Cincinnati Bell Telephone Company,* Case No. 84-1272-TP-AIR, Opinion and Order, October 29, 1985.

CBT's Self-Complaint, however, fails to adhere to the Commission's uniform requirement that utilities calculate pole attachment rates using the FCC formula. CBT has provided no evidence that its proposed pole attachment rate of $9.00 per pole, per year for each one foot of usable space occupied by a "cable operator to provide only cable services" was calculated under the FCC's rate methodology.[3] In fact, based on

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[3] CBT's proposal to charge $9.00 for each foot of occupied usable space is ambiguous and unclear. In any event, to the extent that CBT contemplates charging additional rent for the vertical, usable space occupied by any risers attached by Time Warner, such charges are prohibited under the FCC formula. Risers used to provide service to a customer originate in cable's allocated foot of space, pass through CBT's attachment space, and then on into unusable space to the ground. Because the riser and the main-line cable attachment occupy the same foot of allocated space (and CBT's attachment space), any additional rental assessment for the vertical space "occupied" by the riser would lead to double-recovery. Moreover, the portion of any riser that is located in usable space does not preclude the attachment of additional wires and cables; and, the FCC has never authorized an additional charge for risers. With regard to unusable space, rental assessments for items placed in the portion of the pole used for ground clearance are forbidden. See, e.g., *Texas Cablevision Co. v. Southwestern Elec. Power Co.*, 1985

CBT's publicly filed ARMIS Report for Year End 2004, Time Warner believes that CBT's rate would be less than $3.00 if properly calculated in accordance with the FCC formula.

Time Warner urges the Commission to continue to apply the FCC formula to CBT when setting its pole attachment rates. As the Commission recognized when it first adopted the formula in 1982, the FCC's methodology "simplifies the [rate] process," while providing for a just and reasonable rate. For the same reasons, the great majority of states either defer directly to the FCC's jurisdiction or regulate poles at the state level, but, like Ohio, apply the federal formula.[4]

Indeed, the FCC formula is a straight-forward, self-executing and economically justified approach for determining just and reasonable rates using existing accounting measures to determine costs, based on historical (or embedded) cost methodology and publicly available data. "Congress did not believe that special accounting measures or studies would be necessary [in determining pole rates] because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies . . . ."[5] Reliance on publicly available data – ARMIS Reports in the case of ILECs, like CBT, and FERC Form 1 in the case of electric utilities – has allowed utility pole owners and attaching entities to

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LEXIS 3818, p.6 (1985)(prohibiting rental assessments for attachments in unusable space); see also discussion in Section VI.C., herein.

It is also unclear whether or how CBT intends to charge for anchor attachments. If CBT does plan to charge for anchors, it is important to note that CBT's prior attempts to charge rent for anchor attachments were rejected by Staff. See *In re Cincinnati Bell*, Case No. 84-1272-TP-AIR, Staff Report of Investigation, July 1, 1985, at p. 57. ("By definition, anchor attachment would imply a device fixed on a permanent basis to give stability to what otherwise might be an unstable pole, arising out of additional occupancy. Therefore, Staff recommends that the anchor attachments be treated as a nonrecurring expense and be subject to a one time make-ready charge not to exceed the full costs of said attachment.").

[4] Thirty-two states are regulated directly by the FCC. Eighteen states, plus the District of Columbia have certified to regulate pole attachments. Out of those 19 certified jurisdictions, the large majority employ the FCC formula.

[5] *Alabama Cable Telecomm Ass'n v. Alabama Power Co.*, 15 FCC Rcd 17436, ¶ 5 (2000).

resolve hundreds of rate issues without regulatory involvement, including in states that regulate pole attachments.

The various benefits of the FCC formula's expeditious regime redound to utilities and attachers, as well those state commissions that have adopted the formula. Employing the FCC formula is especially critical in today's highly competitive environment when attachment delays may determine whether consumers have a choice among communications providers.

Continuing to apply the FCC formula in this case will also help ensure that facilities-based competition proceeds on fair terms, notwithstanding CBT's monopoly ownership and control of distribution facilities in Ohio, while providing CBT a fair and reasonable return on its investment.

B. CBT Is Not Authorized To Charge A Higher Rate For Attachments Used To Provide Telecommunications Services.

Without justification, CBT has proposed to implement a separate $18 rate for attachments used to provide non-cable services – double the rate proposed for cable attachments. *See* CBT's November 2, 2005 Application, and compare Exhibit A, 13th Revised Sheet 40 with Exhibit B, proposed 14th Revised Sheet 40. This is not permitted under Commission rules or precedent. The Commission has never adopted one formula for attachments that are used to "provide only cable services" and a separate, higher rate for all other attachments. Rather, the Commission has found that the FCC formula established in the original Pole Attachment Act of 1978, yields a just and reasonable rate and has consistently applied that methodology to Ohio pole owners.

Although Congress established a separate rate formula for attachments used to provide telecommunications services when it amended the Pole Attachment Act

in 1996, Congress did so with the expectation that facilities-based competition would flourish leading to a rate for telecommunications providers roughly equivalent to the rate for cable attachers (*i.e.*, a cost-based rate). Instead, the rate methodology applied to telecommunications attachments acts as a non-cost based surcharge on telecommunications providers and has led to a number of disputes at the FCC due to the difficulties associated with implementing the Telecom Rate. Time Warner therefore requests that the Commission reject CBT's unauthorized attempt to implement a hefty surcharge on non-cable attachments and instead apply the simple and expeditious FCC "cable" formula.

When the 1978 Pole Attachment Act (47 U.S.C. § 224, *et seq.*) was amended as part of The Telecommunications Act of 1996, Congress extended Section 224 to include "telecommunications carriers," as well as "cable television systems." 47 U.S.C. § 224(a)(4). Only "cable television systems" were covered under the original Pole Attachment Act. In addition to granting access to cable television systems and telecommunications carriers (except incumbent LECs) alike, in 1996 Congress also amended the Pole Attachment Act to include a separate rate "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services . . . ." 47 U.S.C. § 224(e)(1) (hereinafter the "224(e) Rate" or "Telecom Rate.").

The Telecom Rate also applies to cable system attachments used to provide "telecommunications services," as defined by the 1996 Act. Id. at 224(e)(3). The same formula adopted by this Commission in 1982, (*i.e.*, the "224(d) Rate" or "Cable

Rate") continues to apply to cable system attachments used to provide other commingled services, including Internet services.[6]

The Telecom Rate went into effect on February 8, 2001 and was "phased in equal annual increments over a period of 5 years beginning on the effective date." Id. at 224(e)(4). The Telecom Rate became fully implemented on February 5, 2005. Unlike the Cable Rate formula, which allocates the cost of unusable space based on the portion of space used, or "usable" space, (*i.e.*, 1 foot under the FCC formula), the Telecom Rate formula allocates the costs of "unusable" space based on the average number of attaching entities attached to the pole. Id. at 224(e)(2). Thus, the more entities to a pole owner's poles, the lower the rate.[7]

Indeed, Congress designed the formula so that as the number of attachers increased on the poles, the Telecom Rates for individual attachers would decrease. Time Warner understands that at the time the Pole Attachment Act was amended in 1996, however, Congress assumed that multiple, facilities-based competitors would spring up in every market and that by the end of the 5 year implementation period, Telecom Rates would be at or even below Cable Rates. Unfortunately, facilities-based competitors, such as CLECs, which were envisioned to share proportionally in the unusable space element of the Telecom Rate, failed to materialize in the numbers Congress expected when it amended the Pole Attachment Act in 1996. As a result, Telecom Rates in FCC states can be two to three times higher than the Cable Rate. Further, because the process for

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[6] *National Cable & Telecomm Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (finding, inter alia, that the FCC had jurisdiction over commingled cable and Internet attachments).

[7] Time Warner provides this explanation of the mechanics of the Telecom Rate formula to demonstrate that as compared to the Cable Rate formula, the Telecom Rate formula factors in non-public data and is not easily applied. Time Warner does not suggest that CBT even attempted to calculate either its "cable only" rate or its "non-cable"" rate in accordance with any formula. Instead, CBT seems to have set an arbitrary "cable only" rate and doubled it to come up with its "non-cable" rate.

"counting" both the average number of attaching entities and the number of pole attachments actually used for telecommunications traffic (in the case of a cable system) is still unsettled, implementation of the Telecom Rate in states subject to FCC pole attachment jurisdiction often leads to disputes.

For these and other important pro-competitive reasons, every certified state to address the issue since 1996 has endorsed the "Cable Rate" formula for application to all attachers.

In 1998, for example, the Public Utilities Commission of the State of California ("CPUC") expressly extended the Cable Rate to all attachers. In doing so, the CPUC cited important policies, recognizing the competitive implications of having two separate rates, as well as the difficulties in implementing a dual scheme:

> Requiring telecommunications carriers and cable operators that provide telecommunications services to pay more for pole and conduit attachments than cable operators that do not provide telecommunications services when there attachments are made in the identical manner and occupy the same amount of space would subject such carriers and cable operators to prejudice and disadvantage, would deter innovation and efficient use of scarce resources, and would harm the development of competition in California's telecommunications markets.
>
> Sections 224(d) and (e) . . . do not require states to provide for different rate provisions . . . . Attempting to distinguish "cable television service" from "telecommunications service" would entangle the Commission in semantic disputes and would not represent the best use of the Commission's resources.[8]

In 2002 the State of New York Public Service Commission similarly decided against adopting a separate Telecom Rate for competitive reasons.

> We adopted the FCC's approach and methodology for determining pole attachment rates in 1997 in order to simplify regulation of

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[8] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Services*, 1998 LEXIS 879, p. 114 (CPUC 1998).

> pole attachments, thereby encouraging telecommunications competition and stimulating economic development . . . . At that time, up to six pole attachments per utility pole, were anticipated, which would have resulted in low, affordable rates . . . . However, facilities-based competition has not developed in New York to the extent contemplated in 1997.[9]

Over the last several years, the Regulatory Commission of Alaska and the New Jersey Board of Public Utilities have also adopted the cable formula for both cable and telecommunications attachments.[10] Likewise, the Utah Department of Public Utilities is in the process of completing a pole attachment rulemaking in which it has indicated its intent to adopt the FCC's Cable Rate formula for all attachers. The only exception is the Vermont Public Service Board, which applies the Cable Rate formula to all attachers, but allocates 2 feet of space to non-cable television service providers.[11] Nevertheless, Vermont uses a much more favorable usable space presumption than the FCC—16 feet rather than 13.5 feet—which can have a significant impact on a pole attachment rate.[12]

Time Warner urges the Commission to follow the pro-competitive example of its certified state counterparts and reject CBT's unauthorized implementation of a higher, non-cost based rate for non-cable attachments.

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[9] *Proceeding on Motion of the Commission as to New York State Electric & Gas Corporation's Proposed Tariff Filing to Revise the Annual Rental Charges for Cable Television Pole Attachments and to Establish a Pole Attachment Rental Rate for Competitive Local Exchange Carriers*, Case 01-E-0026, et al., Order Directing Utilities To Cancel Tariffs, pp. 3-4 (NYPSC Jan. 15, 2002).

[10] See *In the Matter of the Consideration of the Rules Governing Joint Use of Utility Facilities and Amending Joint Use Regulations Adopted Under 3 AAC 52.900 – 2 AAC 52.940*, Order Adopting Regulations, p.3 (RCA Oct. 2, 2002). See also N.J.A.C. § 14:18-2.9(a).

[11] VT. PUB. SERV. BD. R., 3.706(D)(1)(b)(ii).

[12] Id. at 3.706(D)(2)(c).

C. Rental Assessments For Auxiliary Equipment Are Not Justified Under The FCC Formula.

CBT also proposes an unjustified $18.00 per pole per year charge "for each piece of auxiliary equipment such as power supplies, equipment cases, cabinets or other similar equipment attached to a pole." *See* CBT's November 2, 2005 application, Exhibit 13, proposal 14th Revised Page No. 40, Section 3.1.2. To the extent this type of equipment is attached in the "unusable" space (*i.e.*, that space on the pole reserved to ensure adequate clearance), which it typically is, long-standing FCC precedent prohibits utilities from charging for any unusable space occupied by cable equipment. In addition, any equipment that is incidental to the horizontal, cable attachment, located in either usable or unusable space, is considered part of the mainline attachment and may not be assessed a separate rental charge. See, e.g., *Texas Cablevision Co. v. Southwestern Elec. Power Co.*, 1985 LEXIS 3818, p.6 (1985):

> First, in adopting a standard one foot of space deemed occupied by CATV, the Commission not only included that space occupied by the cable itself, but also the space associated with any equipment normally required by the presence of the cable television attachment . . . . Moreover, to the extent that this ancillary equipment may occupy the 18-28 feet designated as "ground clearance," which by definition is excluded from usable space, it is to be omitted from any measurements . . . .

The Commission should similarly follow the FCC's guidance on this issue.

## VII. Conclusion

Cincinnati Bell Telephone Company filed a Self-Complaint on November 2, 2005 to increase its pole attachment rates and to change the language in its pole attachment tariff. Time Warner Cable, a cable television operator providing service

in CBT's service territory, will be adversely affected by this proposal. It has a real and substantial interest in this case and its interest is not being adequately represented by anyone else. Its motion to intervene should be granted.

CBT is under an elective alternative regulation plan which became effective July 1, 2004. It misclassified pole attachment and conduit occupancy rates as a "non-specific service charge" instead of a Tier 1 service. The proposal to raise pole attachment rates by 100 percent and more violates the Commission's elective alternative regulation retail pricing commitment rules. For that reason alone, the Self-Complaint should be dismissed.

In the alternative, if the Commission does not dismiss CBT's filing, it should order a full suspension of the tariff filing pursuant to Rule 4901:1-6-04(B) of the O.A.C. No rationale or reason supporting the changes has been offered. In fact, the proposed changes clearly violate this Commission's long-held methodology in establishing pole attachment rates. If the Commission does not choose to dismiss the Self-Complaint, at the very least, the Self-Complaint should be fully suspended. For the same reasons, a hearing should also be scheduled. The proposals on their face do not appear to be just or reasonable. Finally, Time Warner has offered in detail numerous objections to the Self-Complaint which would support the Commission's denying the relief sought by CBT in this case.

WHEREFORE, Time Warner Cable respectfully requests that the Commission grant its Motion to Intervene and Motion to Dismiss. If the Commission chooses not to grant the Motion to Dismiss, it should grant the Motion to fully suspend the Self-Complaint and to schedule a hearing. Ultimately, the Commission should deny the Self-Complaint on the basis of the objections set forth in this pleading.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document were served upon D. Scott Ringo, Jr., Assistant Secretary and Director of Regulatory Affairs, Cincinnati Bell Telephone Company, 201 E. Fourth Street, P.O. Box 2301, Cincinnati, Ohio 45201-2301, via first-class U.S. mail, postage prepaid, and upon Evelyn King, Regulatory Contact Person (evelyn.king@cinbell.com) via electronic mail, this 23rd day of November, 2005.

Stephen M. Howard

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