BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Time Warner NY Cable LLC,	:	
Complainant,	:	
		Case No. 09-379-TP-CSS
v.	:	
Cincinnati Bell Telephone Company LLC,	:	
Respondent,	:	
Relative to a Complaint Pursuant to Section 4905.26, Revised Code.	:	

TWC'S MEMORANDUM CONTRA CBT'S MOTION TO DISMISS

Pursuant to Rule 4901-1-12(B) of the Ohio Administrative Code, Complainant Time Warner NY Cable LLC ("TWC") respectfully files this memorandum contra the Motion to Dismiss submitted on June 3 by Cincinnati Bell Telephone Company LLC ("CBT").

CBT's Motion does not even attempt to join issue with the fundamental question posed by TWC's Complaint—namely, whether Ohio should join every other state that has weighed in on the matter by rejecting the "Telecom Rate" formula. Instead, CBT calls this uniform body of precedent "irrelevant," CBT Answer ¶¶ 20-23, refuses to discuss the question, and asks the Commission to dismiss TWC's Complaint on various grounds unrelated to the merits.

CBT's Motion should be denied because its arguments are wrong as a matter of law. CBT first argues that TWC's challenge to CBT's rates is barred by the filed rate doctrine. CBT Mot. 2-3. But the filed rate doctrine only prevents the Commission from retroactively changing rates it has affirmatively approved, not from finding that a rate it did *not* affirmatively approve was improper in the first place. Nor does the doctrine bar the Commission's consideration of a secondary dispute between the parties about which of CBT's filed rates would properly apply.

Next, CBT argues that the Commission "expressly approved" a two-tiered rate system in Ohio when it signed off on a stipulation, agreed to among various parties, that set CBT's rates for 1998-2005. CBT Mot. 4. CBT dramatically overreads the stipulation. Commission signoff on a party-specific rate compromise, without any consideration of rate formulas, certainly does not constitute express adoption of any particular formula or statewide rate structure. Further, the stipulation expired in 2005, meaning the Commission never signed off on CBT's rates for 2007 through 2009. The stipulation is simply irrelevant to the legality of CBT's current rates.

Finally, CBT argues that the Commission in fact *has* made an affirmative decision to adopt the Telecom Rate. CBT Mot. 5. Its evidence: the Commission used the word "formulas," instead of "formula," in referring to FCC rules in a 2007 order. But the Commission's use of the plural does not necessarily refer to multiple pole attachment "formulas"; as explained below, it more likely recognizes the existence of both pole and conduit rate formulas. And in any event, the notion that the Commission affirmatively altered Ohio's 25-year-old pole attachment rate regime solely through use of the letter "s" should be rejected. The Commission should reach the merits of TWC's Complaint and conclude—in accord with every state to have considered the question—that a single pole attachment rate should be used for all attachments.

As for the calculation of the Telecom Rate itself, CBT argues that that formula would allow CBT to charge "a rate as high as $11.75." CBT Mot. 6-7. The Commission does not have to reach these rate-calculation issues, of course, if it rejects the Telecom Rate formula. But in any event, CBT's calculations are incorrect in several respects, and its unsupported "data" do not suffice to rebut the legal presumption that its poles have on average five attaching entities (the primary dispute concerning the calculations). Even if the Telecom Rate did exist under Ohio law, CBT would have substantially overcharged TWC for the last two years and the current year.

I. THE FILED RATE DOCTRINE DOES NOT APPLY TO TWC'S LEGAL CHALLENGE TO CBT'S POLE CHARGES.

CBT's primary argument, that the filed rate doctrine bars TWC's claim, is wrong for three primary reasons. First, the doctrine applies only to rates that have been affirmatively approved by the Commission and thus given the stamp of presumptive legitimacy. CBT's pole attachment rates since 2007 have never been subject to a PUCO decision. Second, the filed rate doctrine does not apply where questions exist about which of a utility's filed rates apply in a particular situation. Just such a question exists in this case, given that TWC has long disputed the notion that any rate other than CBT's "Cable" rate could apply to TWC, which after all is a cable operator. Finally, even if the filed rate doctrine had some application here—which it does not—it would not preclude TWC's claim for 2009; nor would it preclude TWC's general complaint that CBT's pole attachment rates are illegal. We address these points in turn.

A. The Filed Rate Doctrine Applies Only To Rates That Have Been Affirmatively Approved By The Commission.

CBT's filed-rate argument fails, first and foremost, because the doctrine applies only to tariff rates that have been affirmatively approved by a regulator. Indeed, that has always been the doctrine's premise: In the leading case on the doctrine, *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), Justice Brandeis explained that litigants could not seek damages stemming from a filed rate because "the rates had been approved by the [Interstate Commerce] Commission" and "[t]hat approval established that the fixed rates were 'reasonable and non-discriminatory.' " *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 415 (1986) (quoting *Keogh*, 260 U.S. at 161).

The doctrine thus exists to prevent whipsawing—*i.e.*, to protect utilities from relying on regulatory approval of a rate and then later being penalized, via retroactive ratemaking, for

having collected that rate. The Ohio cases have always recognized as much. In *Keco Industries, Inc.* v. *Cincinnati & Suburban Bell Telephone Co.*, 141 N.E.2d 465 (1957), the Ohio Supreme Court held that a utility customer cannot seek restitution where a utility collected a rate that had been affirmatively authorized by the Commission but later invalidated on appeal. The *Keco* court explained that "[w]here the charges collected by the carrier were based upon rates which had theretofore been *established or approved by the public authority*, the fact that such rates are subsequently reduced affords no right of action for damages . . . ." *Id.* at 469 (emphasis added; quotation marks and citation omitted). The court held "that any rates *set by the Public Utilities Commission* are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court" and that utility customers are not entitled to repayment of monies collected pursuant to such approved rates. *Id.* (emphasis added).

Subsequent Ohio cases, following *Keco*, likewise have emphasized that the filed rate doctrine exists to protect *approved* rates from retroactive attack. In *Ohio Edison Co.* v. *PUC*, 384 N.E.2d 283 (1978), the Supreme Court explained that a public utility may not "be found to have violated the law by obedience to an order" of the Commission "which the commission now finds to be in error." *Id.* at 286. The Court explained that such a result would violate the Ohio Constitution "in that it would . . . retroactively change a regulatory order of the commission, having the effect of an existing law." *Id.* Likewise, the Court in *Green Cove Resort I Owners' Ass'n* v. *PUC*, 814 N.E.2d 829 (Ohio 2004), explained that *Keco* prevents the Commission from "order[ing] a refund of *previously approved rates*." *Id.* at 834 (emphasis added).

The filed rate doctrine has no application here because CBT's attempt to impose the Telecom Rate has not been "established or approved" by the Commission, *Keco*, 141 N.E.2d at 469, and a holding that that rate is unlawful therefore would not "retroactively change a

regulatory order of the commission, having the effect of an existing law," *Ohio Edison*, 384 N.E.2d at 286. CBT's only possible argument to the contrary is that the Commission's 1998 approval of a compromise rate stipulation—a stipulation that covered the years 1998-2005 and expired four years ago—constitutes the requisite approval of CBT's *current* rates. Yet that argument is clearly incorrect. It would do violence to the stipulation to give it force and effect beyond its termination date. Because the Commission never approved CBT's current rates, the whipsawing concern at the heart of the filed rate doctrine does not apply. The doctrine is inapplicable by its terms.

B. The Filed Rate Doctrine Does Not Apply Where The Rate The Utility Is Charging Conflicts With Prior Commission Guidance.

For substantially the same reasons, the filed rate doctrine does not apply where the rate a utility is charging conflicts with Commission guidance on what the proper rate should be. In *Lucas County Commissioners* v. *PUC*, 686 N.E.2d 501 (1997), the Supreme Court reiterated the rule, established by *Keco*, that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." *Id.* at 504. But the Court then went on to explain that ratemaking was *not* retroactive—and therefore the filed rate doctrine did not apply—where the newly-sought rate "was pursuant to rates authorized by an initial commission order that the commission had since erroneously limited." *Id*. Likewise, in *Columbus Southern Power Co.* v. *PUC*, 620 N.E.2d 835 (1993), the Court refused to apply the filed rate doctrine because earlier Commission guidance had provided the framework for the proper rate. It explained that because "PUCO's initial order in this proceeding specifically authorized recovery of the deferred revenues in question," the rate "change" being sought was no change at all and "would not violate the proscription against retroactive ratemaking." *Id.* at 841. For that reason, "*Keco* [wa]s clearly not controlling." *Id.*

The same analysis applies here. As explained in TWC's Complaint, this Commission has long held that the Cable Rate formula is the proper formula to use to derive pole attachment rates. Cmplt ¶¶ 12-14. Just as in *Columbus Southern*, that lawful rate regime was discernible in prior Commission orders, and an order reiterating that fact would in no sense constitute retroactive ratemaking.

C. The Filed Rate Doctrine Does Not Apply To Questions Of What Filed Rate To Apply.

The filed rate doctrine is also inapplicable here for a second, independent reason: The parties dispute not just whether CBT's filed rate is lawful but also *which* of CBT's two filed rates to apply. The doctrine clearly has no application in such a case.

The heart of TWC's Complaint is that the Cable Rate formula derives the maximum pole attachment rate under Ohio law and that CBT's rate is illegal to the extent it exceeds that rate. But CBT has now placed before the Commission a closely related dispute between the parties: whether, putting maximum rate formulas to the side, CBT can charge TWC the "All Others" rate under its tariff. As explained in TWC's Complaint, CBT's Tariff lists attachment rates of $4.50 for "Cable" and $8 for "All Others." Cmplt ¶ 30. The terms "Cable" and "All Others" are defined in neither the tariff itself nor in the 1998 stipulation approving the compromise rate. *Id.* And while CBT argues in its Motion that "i[t] is undisputed that CBT's filed tariff rate for pole attachments used for telecommunications purposes is $8.00," CBT Mot. 7, that is incorrect. TWC in fact has long contended that "Cable" and "All Others" categories refer to the type of entity doing the attaching, not to the types of services provided over the attachments. *See*, *e.g.*, Cmplt Exhibit C (TWC letter of May 16, 2006 asserting that "Cable" tariffed rate, not the "All Others" rate, applies). Because TWC is a cable company, TWC would be entitled to pay no

more than the "Cable" tariffed rate—$4.50 per pole—regardless which formula derives the maximum lawful pole rate under Ohio law.

The parties, in short, dispute not just whether the Telecom Rate exists in Ohio but also which of CBT's two filed rates applies in any event. There is no question that such a dispute requires no "retroactive ratemaking" and thus is outside the ambit of the filed rate doctrine. Indeed, the Supreme Court of Ohio has squarely held that this is exactly the sort of dispute that *should* be brought pursuant to Section 4905.26. In *Kazmaier Supermarket, Inc.* v. *Toledo Edison Co.*, 573 N.E.2d 655 (1991), the Court addressed a customer's complaint that it had been "billed under the wrong rate schedule for a specified period of time." *Id.* at 660; *see also id.* at 656 (describing the customer's allegation that the "account was to be billed on Rate GS-12," as listed in the utility's tariff, but "was inadvertently billed on Rate GS-16"). The Court held that "[t]his type of claim is one which by way of complaint may be properly raised before the commission pursuant to R.C. 4905.26." *Id.* at 660. Because just such a question is before the Commission in this case too, CBT is wrong to assert that the filed rate doctrine applies.

D. The Filed Rate Doctrine Has No Applicability To TWC's Claim Regarding CBT's 2009 Rates Or To TWC's Claim That CBT's Rates Are Unlawful.

Finally, even assuming *arguendo* that the filed rate doctrine had some application here, it would preclude neither TWC's claim regarding CBT's 2009 rates nor TWC's more general claim that CBT's rates unlawfully exceed the Cable Rate. CBT argues that TWC's claim for 2009 overcharges is foreclosed because the filed rate doctrine precludes retroactive ratemaking and TWC "waited until several months after the due date of the 2009 pole attachment invoice to challenge CBT's 2009 rates." CBT Mot. 3. This contention plays fast and loose with the facts. CBT charges in advance for each year's pole rent, *see* Cmplt Exhibit A (PUCO No. 1 Tariff at 39), and TWC challenged CBT's 2009 billing as soon as it received its invoice. *See* Cmplt ¶ 44.

None of the authority cited by CBT stands for the absurd proposition that the filed rate doctrine applies to protect a utility's unpaid invoice for a future time period. Nor has any case penalized a customer for attempting to achieve a negotiated resolution before it files a complaint. The doctrine, which addresses "retroactive" ratemaking, does not apply to litigation concerning CBT's *current and unpaid* bill for services not yet fully rendered.

And of course, it goes without saying that the filed rate doctrine does not foreclose TWC's fundamental claim: that CBT's pole attachment rates are illegal because they exceed the rate derived by the Cable Rate formula. Section 4905.26 authorizes the Commission to "find a rate or tariff provision unlawful, unjust, unreasonable or discriminatory." *Consumers Counsel* v. *PUC*, 575 N.E.2d 157 (1991). CBT's broad reading of the filed rate doctrine would render that statutory provision a nullity.

II. NEITHER THE 1998 STIPULATION NOR THE 2007 ORDER CONSTITUTES COMMISSION ADOPTION OF THE TELECOM RATE INTO STATE LAW.

A. The 1998 Stipulation Is Irrelevant.

CBT argues that the Commission "expressly approved" CBT's current pole attachment rates when it signed off on a stipulation in 1998 that set compromise rates for the years 1998-2005. CBT Mot. 4. Although it is not entirely clear, the thrust of CBT's argument appears to be that because the Commission once approved "a higher non-cable pole attachment rate" for CBT, the Commission must believe the Telecom Rate formula is a permissible formula for calculating Ohio rates generally. CBT Mot. 3; *see also* CBT Answer 2 (asserting that the Commission "approved the use of dual rates in Ohio" when it signed off on the 1998 stipulation).

This argument is without merit. The stipulation approved by the Commission in 1998 was an agreement among various parties setting compromise rates. Those rates had no explicit relationship to the Telecom Rate and do not appear to have been set with that formula in mind.

Indeed, the phrase "Telecom Rate" appears nowhere in the stipulation; there is no discussion of how the rates were chosen. *See In re Cincinnati Bell Tel. Co.*, No.96-899-TP-ALT, 185 P.U.R.4th 214 (PUC 1998).[1] The Commission's approval of a compromise rate, with no discussion of rate formulas or how they were expected to be applied, hardly suggests that the Commission intended to adopt the Telecom Rate into state law.

B. CBT Confuses State And Federal Law And Misreads The 2007 Order.

CBT next argues that the PUCO decisions adopting the Cable Rate "no longer apply" because (i) they predate the federal Telecom Rate and (ii) this Commission abrogated them by the use of a plural noun in a 2007 decision. CBT Mot. 4-5. Both arguments are meritless.

1. This Commission's Decisions Are Not Outdated.

As TWC explained in its Complaint, this Commission repeatedly has adopted the Cable Rate as governing Ohio law and announced that the Cable Rate sets the rate limit in "*all cases*." *Application of Cincinnati Bell Inc. for Authority to Adjust its Rates and Charges and to Change its Tariffs*, No. 81-1338-TP-AIR, at 42 (P.U.C. 1983) (emphasis added) (*Cincinnati Bell Rate Order*"); *see* Cmplt ¶¶ 11-14. CBT now suggests that these Commission decisions are no longer good law because they date to 1995 and earlier, while Congress did not create the Telecom Rate until 1996. CBT Mot. 4; *see* CBT Answer ¶ 11. This argument misunderstands the relationship between state and federal law. Because Ohio is a "certified state" under 47 U.S.C. § 224, it has full regulatory authority over pole attachments, and it chooses what law to adopt; new federal pole attachment laws have no force or effect in Ohio unless and until the Ohio Legislature or this

[1] Nor is there any indication that the rate for "All Others" might be applied to cable operators under any circumstances. *See supra* at 6-7. Furthermore, that the Ohio Cable Telecommunications Association signed off on the stipulation, at a time when no cable operators in Ohio provided any kind of voice services, hardly bears significance.

Commission says they do. *See* Cmplt ¶ 8. It therefore is irrelevant that the United States Congress added a new pole attachment formula to the FCC's repertoire in 1996. The relevant point is that *this* Commission adopted the Cable Rate as the rate to use in "all cases," *Cincinnati Bell Rate Order* at 42, and has never revisited that decision.

2. CBT Misreads The 2007 Order.

CBT also argues that this Commission explicitly adopted the Telecom Formula—and abrogated all of its previous decisions on the topic—when it used the word "formulas" (as opposed to "formula") in a 2007 Order. CBT Mot. 5. CBT is mistaken.

CBT relies on Rule 4901:1-7-23(B), which states in relevant part:

> Rates, terms, and conditions for nondiscriminatory access to public utility poles, ducts, conduits, and right-of-way shall be established through negotiated arrangements or tariffs. Such access shall be established pursuant to 47 U.S.C. 224; 47 C.F.R 1.1401 to 1.1403; 47 C.F.R 1.1416 to 1.1418; and *the formulas in 47 C.F.R 1.1409(e)* . . . .

(emphasis added). According to CBT, this rule signals adoption of the Telecom Rate because the Cable Rate and the Telecom Rate formulas are both reproduced in 47 C.F.R. 1.1409(e), and therefore the Commission must have been indicating, by use of the plural, that both should be employed. CBT Mot. 5. "Had the Commission intended only to adopt the FCC cable formula," says CBT, "it would have stated in the rule to use only the cable rate ***formula*** (singular) in 47 C.F.R. 1.1409(e)(1)." *Id.* (emphasis in original).

This argument misreads the relevant rule. Rule 4901:1-7-23, as is apparent from the text quoted above, refers to the setting of rates not just for poles but also for "conduits." And 47 C.F.R. 1.1409(e) contains not just the FCC's pole attachment formulas but also the formula that "appl[ies] to attachments to conduit." 47 C.F.R. 1.1409(e)(3). The Commission's reference to "formulas" therefore is more likely to refer to the "formulas" for pole attachments and conduit

than to multiple pole attachment "formulas." The Commission could not have used the singular "formula" in its rule; that would have made no sense given that the federal regulation refers to both pole and conduit formulas. CBT's favored rule proves nothing.

Furthermore, even if the rule had unambiguously referred to pole attachment formulas, that would hardly suffice to overcome this Commission's considered jurisprudence adopting the Cable Rate as the sole pole attachment formula in Ohio. The 2007 proceeding in which Rule 4901:1-7-23(B) was adopted included no discussion of the different federal formulas for pole attachment rates and no briefing about the merits of the Telecom Rate formula. *See In re Establishment of Carrier-to-Carrier Rules*, No. 06-1344-TP-ORD, 2007 WL 2420404, at *45-46 (P.U.C. 2007). In that circumstance, the Commission's use of a plural noun would not suffice to reverse its earlier decisions or to preclude its consideration of the Telecom Rate issue on the merits. *See Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (explaining that adjudicators do not "by implication . . . overrule[ ] an earlier precedent").

C. The Commission Should Reject The Telecom Rate Formula For All The Reasons Discussed In TWC's Complaint.

This Commission, in short, has never considered the merits of the Telecom Rate, and thus has never had a chance to evaluate the arguments against that rate formula—arguments that have persuaded every state utility commission to consider the question. *See* Cmplt ¶¶ 20-23. The Commission should follow those well-reasoned decisions and adhere to its rule establishing the Cable Rate as the rate formula in all cases.

That would be the appropriate outcome for a host of reasons—all of which CBT declines to address in its motion. First, avoiding the inflated rates produced by the Telecom Rate formula provides "incentive for facilities-based local exchange competition." *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Serv.*, 82

CPUC 2d 510, 1998 WL 1109255, at *28-29 (Cal. P.U.C. 1998) ("*California Order*"). Second, adopting the Telecom Rate "may inadvertently increase overall costs to consumers." *Consideration of the Rules Governing Joint Use of Utility Facilities & Amending Joint-Use Regulations*, 2002 WL 32830485 (Alaska R.C. 2002). And last but certainly not least, there is simply no need to adopt the more costly Telecom Rate because *every* authority to consider the question has agreed that the Cable Rate fairly compensates utilities for the space the attacher uses on the pole. Indeed, the United States Supreme Court in *Florida FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), concluded that the Cable Rate fully compensates utilities, *see id.* at 253-254, and the Eleventh Circuit has stated that the Cable Rate actually provides utilities with "much more than marginal cost." *Alabama Power Co.* v. *FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002); *see also RCN Telecom Servs.* v. *PECO Energy Co.*, 17 FCC Rcd 25238, 25241 ¶ 6 (2002) (explaining that *Alabama Power* held that "the Commission's pole attachment formulas, together with the payment of make-ready expenses, provide compensation that exceeds just compensation"). Because "[t]here is generally no difference in the physical connection to the poles" between cable and telecommunications attachments, *California Order* at *28, it necessarily follows that the Cable Rate "provide compensation that exceeds just compensation" for telecommunications attachments too. *RCN Telecom*, 177 FCC Rcd at 25241. There is no need to increase consumer costs and regulatory confusion by providing for a second rate formula when the one already provided under state law offers utilities a fair return.

III. CBT'S CALCULATION OF THE TELECOM RATE IS INCORRECT.

Finally, even if the Commission did choose to import the Telecom Rate formula into Ohio law here, it should reject CBT's calculation of the rate that formula produces and should allow facts to be established at a hearing. CBT's calculation is triply flawed: It uses the wrong

data, it uses data of unknown provenance, and CBT does not provide sufficiently detailed information to overcome certain legal presumptions that drive the rate calculation.

The Telecom Rate is derived using the following formula:

Maximum Rate = Space Factor x Net Cost of a Bare Pole x Carrying Charge Rate,

where

$$\text{Space Factor} = \frac{(\text{Space Occupied} + (2/3 \times \text{Unusable Space}/\text{No. of Attaching Entities}))}{\text{Pole Height}}$$

47 C.F.R. § 1.1409(e)(2). The dispute between the parties here regarding the Telecom Rate calculations turns largely on the "No. of Attaching Entities" factor. TWC assumed for purposes of its calculations that CBT has an average of five attaching entities per pole. TWC Cmplt Exhibit E. This figure is drawn straight from the FCC's default rules, as explained below. CBT, meanwhile, contends (at CBT Mot. 6) that the correct figure is 2.2001—an extraordinarily low number given that the utility and a communications attacher are always counted and thus that "the minimum possible number of attachers . . . is two." *Teleport Commc'ns Atlanta, Inc.* v. *Georgia Power*, 17 FCC Rcd 19859, 19865, ¶ 17 (2002); *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Second Report & Order, 72 FCC 2d 59, ¶ 21 (1979) ("*Cable Order*").

TWC's use of five attaching parties in its rate calculations is mandated here, if the Commission is to permit application of the FCC's Telecom Rate. Under the established Telecom Rate jurisprudence, when calculating the rate for urban areas, there is a legal presumption that poles have attachments owned by an average of five attaching parties. *See In re Amendment of the Commission's Rules & Policies Governing Pole Attachments*, Consol. Partial Order on

Recon., 16 FCC Rcd 12103, 12140, ¶ 72 (2001) ("*Consolidated Order*").[2] Utilities can overcome the presumption and prove that the figure is actually lower, but to do so they must submit "a statistically valid survey or actual data." *Id.* ¶ 70. The utility, in other words, cannot just make assertions about the number of attachers; it must provide detailed, verifiable "data, information and methodology upon which the averages were developed." *Id.* ¶ 67.

CBT's "data" do not come close to meeting these criteria. Far from providing detailed, verifiable information on its calculations, CBT simply asserts without explanation or support that certain of its poles have certain numbers of attachments on them. CBT Mot. Exhibit B. CBT does not explain how it came by this information, how reliable (or unreliable) its counting system might be, or what methodology it is using to determine what it has counted. (Indeed, CBT does not even make clear that it is counting "attaching entities" as opposed to "attachments." CBT's Exhibit B purports to count "the "Number of Attachments including CBT," rather than the number of attaching entities.) Those unsupported assertions do not suffice to rebut the presumption of five attaching entities on the poles. *See Cable Information Servs., Inc.* v. *Appalachian Power Co.*, Mem. Opinion & Order, 81 FCC 2d 383, ¶¶ 6-7 (1980) (finding that utility's limited data submission "fails to meet our requirements" because it "offers no support" for its figures).

Second, a utility's data will not suffice unless they are regularly updated: "[W]hen a new attaching entity has a substantial impact on the number of attaching entities, the utility's . . . average should be modified." *Telecom Order* ¶ 78. CBT offers no hint as to how recent its data might be. Absent some reason to believe the data are updated and reliable—and therefore take

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[2] The FCC adopted this presumption because its data suggested that in urban areas, one can expect "both residential and business commercial competition to flourish" and therefore one can expect to find "the following possible attaching entities: electric, telephone, cable, competitive telecommunications service providers and governmental agencies." *Id.*

into account the new attachers that have sprung up with the enhanced telecommunications competition of the last decade—CBT cannot overcome the five-entity presumption.

Third, even if CBT had come forth with sufficient data (which it has not) regarding the actual number of attaching parties on its poles, CBT has made obvious mistakes in its calculations that throw all of its numbers into doubt. For example, CBT counts 24,883 poles that have only one attachment. But, as explained above, the FCC has long held that the utility itself and a communications attacher must both be counted when deriving the Telecom Rate, "resulting in a minimum of two attaching entities being counted." *Consolidated Order* ¶ 60. These 24,883 poles therefore must all be thrown out of the calculation—an adjustment that, standing alone, would change the average-attachers number from the 2.2001 CBT calculated to 2.603. At the very least, if the Commission does choose to import the Telecom Rate formula, CBT's data must be tested at a hearing in this matter.

CBT, in short, has not come forth with verifiable or detailed data of the number of attaching parties. CBT therefore has not "produced the type or extent of evidence required . . . to overcome the[ ] presumption[ ]," and the default figure of five attachers per pole must be used in the event the Commission decides the Telecom Rate is relevant at all. *RCN Telecom Servs. of Phila., Inc.* v. *PECO Energy Co.*, 17 FCC Rcd 25238, 25242, ¶ 7 (2002). That results in a Telecom Rate of $4.52 for 2007, $3.89 for 2008, and $5.59 for 2009, as TWC stated in its Complaint. *See* Cmplt ¶ 60 & Exhibit D.[3]

[3] CBT also disputes TWC's calculations in other respects, stating that CBT "discovered errors in its 2008 ARMIS data on file with the FCC," made a corrective filing, and relies on the new data in its calculations. CBT Mot. 6 n.12. TWC does not concede the accuracy or reliability of these new data, and intends to explore them in this proceeding in discovery and at the hearing. CBT may not avoid a hearing on the basis of information that has been revised and is unsupported.

CONCLUSION

For all of the foregoing reasons, CBT's Motion to Dismiss should be denied and the relief sought in CBT's Complaint should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served via email and regular U.S. mail this 18th day of June, 2009, upon the following parties:

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Summary: Memorandum TWC's Memorandum Contra CBT's Motion To Dismiss electronically filed by Mr. Stephen M Howard on behalf of Time Warner NY Cable LLC