

Version.” The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(3) File with the Secretary’s Office an unredacted hard copy version of the materials that contains the proprietary information and clearly marks each page of the unredacted confidential version with a header stating “Confidential Version.” The unredacted version must be filed on the same day as the redacted version.

(4) Serve one hard copy of the filed unredacted materials and one hard copy of the filed redacted materials on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §§1.47(g) and 1.735(f)(1) through (3) of this chapter;

(d) Except as provided in paragraph (e) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(e) The Commission will entertain, subject to a proper showing under §0.459 of this chapter, a party’s request to further restrict access to proprietary information. Pursuant to §0.459

of this chapter, the other parties will have an opportunity to respond to such requests. Requests and responses to requests may *not* be submitted by means of the Commission’s Electronic Comment Filing System but instead must be filed under seal with the Office of the Secretary.

(f) The individuals identified in paragraphs (d)(1) through (3) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission’s rules and understands the limitations they impose on the signing party.

(g) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (d) and (e) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(h) Upon termination of the pole attachment complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

[79 FR 73847, Dec. 12, 2014]

§ 1.1409 Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or

provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole

attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Carrying Charge Rate}}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

- in Service Areas where the number of Attaching Entities is 5 = $0.66 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$
- in Service Areas where the number of Attaching Entities is 4 = $0.56 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$
- in Service Areas where the number of Attaching Entities is 3 = $0.44 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$
- in Service Areas where the number of Attaching Entities is 2 = $0.31 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$
- in Service Areas where the number of Attaching Entities is not a whole number =

Federal Communications Commission

§ 1.1409

$N \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$, where N is interpolated from the cost allocator associated with

the nearest whole numbers above and below the number of Attaching Entities.

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

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}} \right]$$

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

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear ft./m.} = \left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[\frac{\text{No. of Ducts} \times \text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \right] \times \frac{\text{Carrying Charge Rate}}{\text{(Net Linear Cost of a Conduit)}}$$

simplified as:

$$\text{Maximum Rate Per Linear ft./m.} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Carrying Charge Rate}}{\text{Rate}}$$

If no inner-duct is installed the fraction, “1 Duct divided by the No. of Inner-Ducts” is presumed to be $\frac{1}{2}$.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (*i.e.*, five years after the effective date

§ 1.1410

of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 66 FR 34580, June 29, 2001; 76 FR 26639, May 9, 2011; 81 FR 5618, Feb. 3, 2016; 81 FR 7999, Feb. 17, 2016]

§ 1.1410 Remedies.

If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the

47 CFR Ch. I (10–1–16 Edition)

amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.

[44 FR 31650, June 1, 1979, as amended at 76 FR 26639, May 9, 2011]

§ 1.1411 Meetings and hearings.

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

§ 1.1412 Enforcement.

If the respondent fails to obey any order imposed under this subpart, the Commission on its own motion or by motion of the complainant may order the respondent to show cause why it should not cease and desist from violating the Commission's order.

§ 1.1413 Forfeiture.

(a) If any person willfully fails to obey any order imposed under this subpart, or any Commission rule, or

(b) If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission pursuant to this subpart make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).

§ 1.1414 State certification.

(a) If the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider