

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION OF)
COMCAST OF DELMARVA, INC., ATLANTIC)
BROADBAND (DELMAR) L.L.C., MEDIACOM)
DELAWARE LLC, AND THE CABLE TELE-)
COMMUNICATIONS ASSOCIATION OF)
MARYLAND, DELAWARE, AND THE DISTRICT) PSC DOCKET NO. 06-61
OF COLUMBIA FOR A RULEMAKING)
PROCEEDING TO AMEND THE DELAWARE)
PUBLIC SERVICE COMMISSION'S RULES)
REGARDING THE ESTABLISHMENT OF JUST)
AND REASONABLE RATES FOR ATTACHMENT)
TO UTILITY POLES)
(FILED FEBRUARY 13, 2006))

IN THE MATTER OF THE INVESTIGATION)
OF REGULATIONS GOVERNING TARIFFS)
WHICH SET FORTH RATES, TERMS, AND) PSC REGULATION DOCKET
CONDITIONS FOR ANY ATTACHMENT TO ANY) NO. 16
POLE, DUCT, CONDUIT, RIGHT-OF-WAY, OR)
OTHER FACILITY OF ANY PUBLIC UTILITY)
(OPENED MARCH 16, 1987; RE-OPENED)
APRIL 11, 2006))

ORDER NO. 6891

NOTICE OF INQUIRY

This 11th day of April, 2006, the Commission determines and Orders the following:

1. On February 13, 2006, three franchised cable system operators, joined by a regional cable association, filed a petition asking the Commission to change its current "Attachment Regulation." See 29 Del. C. § 10114.¹ The Commission adopted those pole and conduit attachment rules - formally labeled the "Delaware Public Service

¹The three operators (here called the "cable operators") are Comcast of Delmarva, Inc., Atlantic Broadband (Delmar) L.L.C., and Mediacom Delaware LLC. The trade association is the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia.

Commission Attachment Regulation" - in 1989.² That action came after Delaware chose to "opt-out" and have State-crafted pole attachment rules, rather than the dictates of the federal Pole Attachment Act, govern in this jurisdiction.³ In their present petition, the cable operators ask the Commission to abandon the current State pole attachment rate "formula"⁴ and instead now incorporate the federal "cable services" methodology as the governing state model for calculating the charges for pole and conduit attachments.⁵ According to the cable operators, their request for a change in the rate formula is driven by the Delaware Electric Cooperative, Inc.'s ("DEC") invocation of the current State formula in its negotiations with one (or more) of the cable operators for new pole attachment contracts. According to the cable side, the State rate formula - as applied by DEC - will move per pole attachment prices to levels five to seven times higher than the charges set forth in current contracts and will generate "Delaware" attachment prices significantly higher than the attachment rates prevailing in the region or the nation. The higher

²See Findings, Opinion and Order No. 3092 (Sept. 26, 1989).

³26 Del. C. § 201(a), as amended by 65 Del. Laws ch. 227 (1986). See 47 U.S.C. § 224(c) (excluding application of federal requirements in a State that has certified it regulates pole attachment rates).

⁴Attachment Regulation, § 7.2.2.

⁵See 47 U.S.C. § 224(d); 47 C.F.R. § 1.1409(e)(1) (rate formula for pole attachments to be used for cable services). As noted, the cable operators urge adoption of the federal "telecommunications services" formula, not the generally "higher-priced" federal "telecommunications services" formula. 47 U.S.C. § 224(e); 47 C.F.R. § 1.1409(e)(2) (rate formula for pole attachments to be used for telecommunications services). The federal telecommunications services formula, as with § 7.2.2 of the State rules, allows a utility pole owner to factor into its attachment rate some share of the cost of the unusable space on a pole. 47 U.S.C. § 224(e)(2); 47 C.F.R. § 1.1417. In contrast, the federal cable services formula focuses almost exclusively on the cable operator's share of the usable attachment space on the pole.

State-formula charges, the operators say, would not only be unjust and unreasonable but would add unfair costs to their efforts to expand their broadband networks. Instead, they argue, the Commission should now move to the federal cable services methodology as the State rule. The use of that formula would yield reasonable, but much lower, attachment rates. And such lower rates will allow cable operators to continue to enlarge their broadband networks, consistent with both federal and State policies to promote the rapid deployment of broadband services.⁶

2. While the cable operators' request might have its origin in negotiations with one pole-owning utility, DEC, their petition necessarily has broader implications: a change in the governing State attachment method and formula would affect not just DEC but other PSC-jurisdictional pole- and conduit- owning public utilities.⁷ At this juncture, the Commission is not prepared to make a decision - one way or the other - about revisiting the 1989 Attachment Regulation (and its rate formula). One avowed purpose of the 1989 regulation was to

⁶The cable operators acknowledge that in 1989 the Commission consciously chose not to adopt the federal "cable" formula (as then interpreted). See PSC Order No. 3092 at ¶¶ 19-20 (DEC's counter-proposal rejects usable space federal method in favor of method that allows allocation of additional costs, including "support" space to attaching entity), 47D (adopting DEC's counter-proposal as State attachment methodology). The cable operators' present point is more that times and policies have changed, and so should the State attachment formula.

⁷The Commission does not view the cable operators' petition for rulemaking as an individual complaint subject to the time limits of Attachment Regulation § 8.3. So too, the Commission does not believe that the operators' petition triggers the "decide or lose jurisdiction" timing limit set forth in 47 U.S.C. § 224(c)(3). In fact, it appears that if Delaware would not exercise pole attachment oversight, the federal pole attachment regime would not apply to DEC, a cooperative corporation. 47 U.S.C. § 224(a)(1).

apply a "minimum" degree of regulation necessary to comply with the legislature's intent and to prevent abuse by either the utilities or the entities which rent space on utility poles or in utility conduits. Thus, neither the Commission, nor its Staff, has accumulated either extensive expertise or knowledge as to the particular practices or charges in this area. In light of that, the Commission will defer any "grant" or "deny" decision on the cable operators' petition until it has solicited, and received, preliminary responses from both pole-owning utilities and others. After it is has become somewhat better educated, the Commission can decide whether or not it should pursue changes to the 1989 State Attachment Regulation.

3. In particular, the Commission seeks preliminary input on the following issues:

- (a) Have utilities and attaching entities historically used the formula set forth in Attachment Regulation § 7.2.2 to determine the pole attachment rates used in current (and past) contracts, or have the parties (in the past) negotiated "just and reasonable rates" for attachments by looking to some other methodologies? If differing criteria were indeed used, what were the methodologies or formulae utilized in current (and past) pole attachment contracts?

- (b) What effect would any change in the State rate formula have on existing pole attachment agreements?
- (c) How should the Commission interpret, in the context of a negotiated contract regime, the principle now expressed in Attachment § 7.1.3(b) that pole attachment rates, terms, and conditions not be "unduly preferential or unjustly discriminatory"? and
- (d) What would be the policy benefits and costs of the Commission now: (i) retaining the current State rule, with its present method and formula; (ii) adopting the federal "cable services" formula and regime; or (iii) adopting the federal "telecommunications services" formula and regime?

Of course, persons and entities filing comments should also respond to any of the assertions in the cable operators' petition that they believe deserves a response.

4. Again, the Commission emphasizes that it is not now taking any position on whether to amend the 1989 Attachment Regulation. It seeks comments in order to give it a better understanding of the policies, and practicalities, that tilt toward, or against, the cable operators' requested rule changes. After receiving input, the Commission will then decide whether, or not, to propose rule amendments.

Now, therefore, **IT IS ORDERED:**

1. That this matter is opened, and this Notice of Inquiry issued, in response to the petition for rule-making filed on February 13, 2006, by Comcast of Delmarva, Inc., Atlantic Broadband (Delmar) L.L.C., Mediacom Delaware LLC, and the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia. For the reasons set forth in the body of this Order, the Commission does not at this time grant or deny such petition but will solicit further input from interested persons and public utilities.

2. The Secretary shall, on or before April 18, 2006, send a copy of this Order to the following persons and entities:

- (a) Delmarva Power & Light Company;
- (b) Delaware Electric Cooperative, Inc.;
- (c) Verizon Delaware Inc.;
- (d) all franchised cable system operators; and
- (e) the Division of the Public Advocate.

The Secretary shall promptly post a copy of this Order on the Commission's Internet website linked to a heading reciting "Commission Seeks Comments Concerning Changes to its Pole Attachment Regulation and its Attachment Rate Formula." The Secretary shall also post a copy of the petition for Rulemaking filed February 23, 2006, on the Commission's website. Such matters shall remain so posted for forty-five days after April 18, 2006.

3. That, as explained in the body of this Order, interested, or affected persons (including consumers) may file comments, objections, or data in response to the petition for rule-making filed

February 13, 2006. The Commission particularly solicits comments focusing on the questions posed in paragraph 3 of the body of this Order. Such comments (original and five copies) shall be filed on or before Friday, May 19, 2006. The petition can be reviewed at the Commission's office or on the Commission's website.

4. That, after receiving the comments solicited in Ordering paragraph 3, the Commission will, by subsequent Order, determine whether to grant the petition and propose rule amendments, or take some other appropriate action.

5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary