

**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. 7069**

This 21<sup>st</sup> day of November, 2006, the Commission determines and Orders the following:

1. In February 2006, three cable operators serving this State, joined by a regional cable trade association, asked the Commission to begin a process to change the Commission's Delaware PSC "Attachment Regulation."<sup>1</sup> The Attachment Regulation (adopted in 1989) governs the

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<sup>1</sup>"Delaware PSC Attachment Regulation," adopted in Findings, Opinion, and Order No. 3092 (Sept. 26, 1989). The Attachment Regulation will be cited as "Attach. Reg." The petitioning cable entities were 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 of Columbia.

rates, terms, and conditions for attachments to, and the use of space within, poles and conduits owned by jurisdictional public utilities.

2. In particular, the petitioning cable entities urged the Commission to bench the formula that currently holds down the maximum end-point of the range for a "just and reasonable" pole attachment rate.<sup>2</sup> In its stead, the cable companies said, the Commission should substitute the 1978 federal "cable service" pole attachment formula.<sup>3</sup> Such a change in formula would make a dollar and cents difference. The federal cable formula allocates the entire costs of the pole depending on the percentage of "usable" space occupied by the attacher. In contrast, the Commission's present formula allocates the pole costs related to "usable space" proportionate to such space occupied by the attacher but adds to that amount a percentage of the pole costs related to the "support space" based on the averaged, total number of attachers. Consequently, the use of the federal cable service formula would (in almost all situations) result in a lower maximum rate cap than the Commission's current maximum formula.<sup>4</sup>

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<sup>2</sup>See Attach. Reg. § 7.2.2.

<sup>3</sup>See 47 C.F.R. § 1.1409(e)(1). With such a substitution, the Commission's definition of a "just and reasonable" rate would mirror, in major respects, the federal description of a just and reasonable rate for pole attachments used by a cable system solely to provide cable services. See 47 U.S.C. § 224(d)(1), (3).

<sup>4</sup>In PSC Order No. 6891 (Apr. 11, 2006), the Commission - or more precisely counsel who drafted the Order - may have misunderstood and hence mis-described the workings of the current Attachment Regulation regime. For example, the prior Order infers that a single formula is used for determining the pole attachment rate. However, the current regulation does not call for a particular rate point but defines a just and reasonable rate as one that would fall within a continuum. See Attach. Reg. § 7.2.2. So too, drafting counsel's descriptions of how various formulas used in calculating pole attachment rates allocate the pole costs may not be entirely accurate. See

3. In response to the petition, the Commission issued a Notice of Inquiry. It sought comments from pole-owning utilities and other entities, not only about the cable operators' rule-making petition but how the just and reasonable rate methodology adopted in the Attachment Regulation has, in fact, played out since 1989. See PSC Order No. 6891 (Apr. 11, 2006). Pole-owning utilities (who in some cases might also be attachers) filed comments and petitioning cable operators responded.

4. On November 16, 2006, the petitioning cable system operators and the cable trade association filed to withdraw their petition for changes to the Attachment Regulation. The withdrawal, they say, should be "without prejudice," allowing them the freedom to seek the same or other changes later.

5. The Commission grants the request to withdraw the petition for rule-making and terminates this docket without further proceedings or action. The petitioning parties no longer seek changes to the Attachment Regulation. Moreover, none of the commenting responses urged revisions to the current pole attachment regime. Finally, the Commission, with due concern to the current drains on its limited resources, sees no compelling need to now press ahead with further inquiry and rule-making about changes to its pole attachment rules and methods.

6. In the context of this case, the terminating action will be "without prejudice" to filing subsequent rule-making petitions. On

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Order No. 6891 at ¶ 1 n. 5. In short, care needs to be taken in "relying" on the rate and formula descriptions set forth in that earlier Order.

the one hand, the Commission generally is not inclined to allow persons to file applications that command Commission resources and then withdraw the request, while preserving the right to start all over again later. Yet, here, particular circumstances (see below) point to allowing the "without prejudice" qualifier. In fact, the Notice of Inquiry issued in response to the petition had its benefits: it allowed Staff to learn how the 1989 attachment regime has been applied by utilities and attaching entities over the ensuing 17 years.

7. Finally, as noted in Order No. 6891, it appears that the cable operators' petition came about, in part, because of the turn of negotiations about new pole attachment rates between Comcast of Delmarva, Inc., and the Delaware Electric Cooperative, Inc. ("DEC").<sup>5</sup> However, since the filing of the cable operators' petition, DEC has "opted-out" and is no longer subject to the regulatory supervision of this Commission. See PSC Order No. 7008 (Aug. 22, 2006). By this Order, the Commission does not make any determination whether the Attachment Regulation continues to apply to DEC. See Attach. Reg. § 3.7 (regulation applies to public utilities not exempted under 26 Del. C. § 202). Nor does the Commission determine whether it remains an available forum to hear any dispute with DEC over pole attachment charges or conditions. If either DEC or an attaching entity believes that the Commission still has a role to play in DEC pole attachment disputes, it can file an appropriate pleading and that "jurisdictional" question can be explored - at the threshold. If such

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<sup>5</sup>The Commission earlier indicated that it did not understand the petition to be a complaint against DEC under the Attach. Reg. § 8.1.

a filing emerges, all parties should be prepared to initially address whether the Commission does indeed have continued regulatory oversight over DEC's leasing of pole and conduit space.

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

1. That, based on the request to withdraw filed by 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 of Columbia, on November 16, 2006, and for the other reasons stated in the body of this Order, this docket is now closed without any further action.

2. That the action under Ordering paragraph 1 shall be "without prejudice" to the ability of the originally petitioning entities to file further petitions for rule-making under 29 Del. C. § 10114.

3. 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

PSC Dockets Nos. 06-61 & Regulation 16,  
Order No. 7069 Cont'd.

/s/ Jeffrey J. Clark  
Commissioner

ATTEST:

/s/ Karen J. Nickerson  
Secretary